Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION, ARIZONA PUBLIC SERVICE COMPANY, GILA VALLEY IRRIGATION DISTRICT, AND FRANKLIN IRRIGATION DISTRICT,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1908 this Court established the federal implied reservation of water rights doctrine. This doctrine holds that when federal lands are reserved from the public domain for a specific purpose, a sufficient quantity of surface water is impliedly reserved for those lands to satisfy the primary purpose of the reservation. This doctrine has been applied to both Indian reservations and non-Indian federal reservations such as national parks and forests. However, this Court has never applied the doctrine of implied reservation of water rights to groundwater. In November, 1999, the Supreme Court of the State of Arizona held that the doctrine does extend to groundwater. In doing so, the court elected to create a new federal common law rule of decision for determining the nature of federal rights to groundwater. The court created new federal common law despite the existence of nondiscriminatory state law that provides all landowners in the State of Arizona, including federal reservations, equal access and rights to groundwater. This case therefore presents the following question:

> May a state court create federal common law to govern a federal reservation's groundwater rights where nondiscriminatory state law already provides a rule of decision giving all landowners in the State equal rights to groundwater?

PARTIES TO THE PROCEEDINGS

Petitioners are Phelps Dodge Corporation, a Delaware corporation, Arizona Public Service Company, an Arizona corporation, and Gila Valley Irrigation District and Franklin Irrigation District, both of which are irrigation districts organized according to the laws of Arizona. Each of the petitioners has filed one or more Statements of Claimant in the underlying proceeding before the Superior Court of the State of Arizona, In and For the County of Maricopa, for adjudication of rights to waters in the Gila River System and Source in Arizona. Each of the petitioners also engages in operations or activities within the State of Arizona that depend upon the use of groundwater.

Respondents are all other parties to the appeal below before the Supreme Court of the State of Arizona, case numbers WC-90-0001-IR through WC-90-0007-IR (consolidated) and WC-79-0001 through WC-79-0004 (consolidated) from which this petition arises.* The Respondents are:

United States of America
Gila River Indian Community
Hopi Tribe

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* The following entities listed as parties to the appeal below before the Supreme Court of the State of Arizona are not considered Respondents because they or their successors are, in their current corporate status, corporately related to Petitioner Phelps Dodge Corporation: Cyprus Christmas Mine Corporation; Cyprus Miami Mining Corporation; Cyprus Pima Mining Corporation; Cyprus Sierrita Corporation; and Cyprus Twin Buttes Corporation.

PARTIES TO THE PROCEEDINGS – Continued

Navajo Nation
San Carlos Apache Tribe
San Juan Southern Paiute Tribe
Tonto Apache Tribe
Yavapai Apache Indian Tribe, Camp Verde Reservation
State of Arizona
State of Arizona Department of Water Resources
Pima County, Arizona
City of Benson, Arizona
City of Chandler, Arizona
City of Flagstaff, Arizona
City of Glendale, Arizona
City of Globe, Arizona
City of Mesa, Arizona
City of Phoenix, Arizona
City of St. Johns, Arizona
City of Scottsdale, Arizona
City of Sierra Vista, Arizona
City of Tempe, Arizona
City of Tucson, Arizona
Town of Gilbert, Arizona
Town of Mammoth, Arizona
Town of Patagonia, Arizona
Apache Nitrogen Products, Inc.
Arlington Canal Company
Arizona Rock Products Association
ASARCO Inc.
Aztec Land and Cattle Company, Limited
Bella Vista Ranches Limited Partnership
Bella Vista Water Company, Inc.
Buckeye Irrigation Company
Buckeye Water Conservation and Drainage District
Central Arizona Irrigation and Drainage District
Concho Water Company
Cortaro-Marana Irrigation District

PARTIES TO THE PROCEEDINGS – Continued

Cortaro Water Users' Association
Escudilla Cattle Company
Members of and Gila Bend-Dendora Valley Water Users Association
Silas Kisto
Wayne D. Klump
J.D. & Maxine Leverton
Leverton Family Trust
Leverton Investments
Little Colorado Association
Magma Copper Company (now BHP Copper)
Maricopa-Stansfield Irrigation and Drainage District
New Magma Irrigation and Drainage District
Pinetop Woodland Irrigation Company
Earl Platt
Ponderosa Domestic Water Improvement District
Rigby Water Company
Rio Rico Properties, Inc.
Rocking Chair Ranch
Roosevelt Irrigation District
Roosevelt Water Conservation District
St. Johns Irrigation and Ditch Company
Salt River Project Agricultural Improvement & Power District
Salt River Valley Water Users' Association
Seven Springs Ranch
Stone Container Corporation (now Abitibi Consolidated Sales Corporation)
Tenneco Arizona Properties Corporation
Tenneco West, Inc.
Valencia Water Company, Inc.
Ray Wrobley, Charles Onion, John Kovavich, Dennis Weckerly – officers and directors of Verde Valley Water Users, Inc.
Woodland Irrigation Company

PARTIES TO THE PROCEEDINGS – Continued

Each of the foregoing is a claimant in the adjudication below in the Maricopa County Superior Court concerning water rights in the Gila River System and Source, or in a second general stream adjudication pending in the Superior Court of the State of Arizona, In and For the County of Apache, No. 6417, concerning water rights in the Little Colorado River System and Source. Each of these parties properly appeared pursuant to the Orders Concerning Petitions for Interlocutory Review (filed December 11, 1990) of the Supreme Court of the State of Arizona as a party to the appeal from which this petition for writ of certiorari arises. Thousands of additional parties have filed Statements of Claimant in the underlying adjudication before the Maricopa County Superior Court, but did not appear as parties in the appeal from which this petition arises. Therefore, these additional claimants are not considered Respondents to this petition pursuant to the Rules of the Supreme Court of the United States.

CORPORATE DISCLOSURE

Pursuant to Rule 29(6), Rules of the Supreme Court of the United States, the Petitioners disclose that Petitioner Phelps Dodge Corporation has no parent corporations and that no publicly held corporations own 10 percent or more of the stock of Petitioner Phelps Dodge Corporation. The parent corporation for Petitioner Arizona Public Service Company is Pinnacle West Capital Corporation, and no other publicly held corporations own 10 percent or more of the stock of Petitioner Arizona

PARTIES TO THE PROCEEDINGS – Continued

Public Service Company. The remaining Petitioners, Gila Valley Irrigation District and Franklin Irrigation District, are irrigation districts organized pursuant to Arizona law and therefore have no parent corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Phelps Dodge Corporation, Arizona Public Service Company, Gila Valley Irrigation District, and Franklin Irrigation District, respectfully request that a writ of certiorari issue to review that portion of the November 19, 1999 opinion of the Supreme Court of the State of Arizona addressing the question of federal reserved rights to groundwater (identified by the court below as "Issue 4").

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arizona is reported at 989 P.2d 739 (Ariz. 1999), and is reprinted in Appendix A. The Supreme Court of Arizona's Orders Concerning Petitions for Interlocutory Review, dated September 11, 1990, are unpublished and are reprinted in Appendix B. The Special Procedural Order Providing for Interlocutory Appeals and Certifications adopted by the Supreme Court of the State of Arizona on September 26, 1989 is unpublished and is reprinted in Appendix C. The relevant orders of the Maricopa County Superior Court are unpublished and are reprinted in Appendices D through F.

JURISDICTION

The Supreme Court of Arizona issued its opinion in this case on November 19, 1999. No motion for reconsideration was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

1. The McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666, provides, in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. . . .

2. Arizona Revised Statutes (A.R.S.), § 45-141.A provides, in relevant part, that "[t]he waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels . . . and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use. . . . "

3. A.R.S. § 45-453 provides, in relevant part, that "[i]n areas outside of active management areas, a person may . . . [w]ithdraw and use groundwater for reasonable and beneficial use. . . . "

STATEMENT OF THE CASE

A. Procedural History of the Question Presented.

This case is a general adjudication of all rights to use water in the Gila River System and Source in the State of Arizona. It was initiated in 1974 by the filing of a petition to adjudicate conflicting claims to water rights in a portion of the Gila River Basin. *See United States v. Superior Court*, 697 P.2d 658, 663 (Ariz. 1985). Additional petitions were subsequently filed for other portions of the basin, and these several actions were consolidated by the Supreme Court of Arizona into a single, comprehensive general stream adjudication. *Id.* at 664. As a general adjudication, this case affects the water rights of all claimants, including federal claimants, who assert a right to use any water subject to the jurisdiction of the court within the geographic boundaries of the Gila River Basin. Furthermore, because "[w]ater usage in Arizona exceeds available surface supply," *id.* at 663, the claims of any one party to the adjudication, including claims asserted by Indian tribes and the federal government, will " 'inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams' " of Arizona. *Id., quoting United States v. New Mexico*, 438 U.S. 696, 699 (1978).

The Gila River Basin encompasses approximately 47% of the land in Arizona. The waters of the Basin are used by millions of Arizonans for municipal, agricultural, industrial, recreational and other purposes. Approximately 85% of the state's population resides in the Basin. J. Folk-Williams, *The Gila Basin and the Waters of Southern Arizona*, p. 4 (1991). However, the surface waters in the Gila River System supply only one fourth of the Basin's

water requirements. *Id.* The balance is met either with Colorado River water imported through the Central Arizona Project, or by groundwater pumped from the large regional aquifers that underlie most of the land in the Basin. *Id.*

As will be discussed in greater detail below, Arizona law establishes a bifurcated system of water rights under which surface water and the "subflow" of surface streams are subject to the doctrine of prior appropriation, while "percolating" groundwater is not subject to appropriation. Instead, percolating groundwater is subject to the doctrine of reasonable use, under which all landowners have an equal right to use groundwater underlying their lands for any reasonable purpose on the land from which it is withdrawn. Nevertheless, because of uncertainties associated with the extent to which underground water is subject to appropriation,[1] as well as the nature of federal rights to groundwater, thousands of parties who assert only a right to pump groundwater under state law have remained parties to the Gila River Adjudication.

Because every claimant is, to one extent or another, adverse to all other claimants, the Gila River Adjudication is a lawsuit of nearly unrivaled scope, complexity and duration. In the late 1970s and early 1980s, more than

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[1] *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source (Gila River II)*, 857 P.2d 1236 (Ariz. 1993). After issuance of the supreme court's opinion in *Gila River II*, the trial court conducted further proceedings on this subject. In 1994, the superior court issued a second ruling that has also been appealed to the Supreme Court of Arizona. Oral argument was presented to the supreme court on December 7, 1999, but no decision has been rendered to date.

849,000 summonses were sent to potential claimants notifying them of the pendency of the case and the procedure for submitting their water rights claims to the court. *See In the Matter of the Rights to the Use of the Gila River (Gila River I)*, 830 P.2d 442, 446 (Ariz. 1992). Those persons to whom summonses were sent included virtually all landowners within the geographic boundaries of the Gila River Basin, as well as "federal, state and local governments and agencies, Native American communities, and irrigation districts within the watersheds" and "all well owners of record and all known holders of water rights within the watersheds. . . . " *Id.* In response, more than 66,000 separate "Statements of Claimant" were filed by more than 24,000 claimants, including individuals, municipalities, corporations, irrigation districts, state and federal governmental agencies, and numerous Indian tribes with reservations located in the Gila River Basin. As a result, this case is one of the largest legal proceedings ever adjudicated in the United States.

The magnitude of this case and the significance of the issues it raises have resulted in many years of litigation without any final adjudication of specific water rights.[2] In the first half of the 1980s, both this Court and the Supreme Court of Arizona considered the jurisdiction of

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[2] While there has been no final determination of water rights through litigation, there have been four settlements approved by the Gila Adjudication court that resolve some or all of the claims of specific Indian tribes within the basin. Those tribes are the Salt River Pima-Maricopa Indian Community, the Fort McDowell Indian Community, the Yavapai-Prescott Indian Tribe and the San Carlos Apache Tribe (partial settlement).

the Arizona state courts to adjudicate water rights of Indian tribes. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Superior Court*, 697 P.2d 658 (Ariz. 1985). In *San Carlos Apache Tribe*, this Court noted "the important federal interest in allowing all water rights on a river system to be adjudicated in a single comprehensive state proceeding," *San Carlos Apache Tribe*, 463 U.S. at 551, and held that the water rights claims of Indian tribes can be subject to state court jurisdiction pursuant to the McCarran Amendment, even in states admitted to the Union under congressional enabling acts that required the state to disclaim any interest in Indian lands. *Id.* at 564. The Supreme Court of Arizona later concluded that the state courts have jurisdiction to consider Indian water rights claims under the nearly identical disclaimer language found in the Arizona Constitution. *United States v. Superior Court*, 697 P.2d at 670.

B. Superior Court Proceedings Below.

After resolution of these threshold jurisdictional issues, the Maricopa County Superior Court began prioritizing and managing the thousands of claims in the Gila Adjudication. The court issued comprehensive case management orders and convened frequent status conferences intended to identify and address important legal issues requiring early attention by the court. During this process of framing the issues that would determine the future course of the adjudication, several parties filed a motion for summary judgment to "exclude from the adjudication all wells which are pumping 'percolating groundwater.' " Order dated September 9, 1988, at App. D2. In considering the issues raised in the motion, the court determined,

sua sponte, that it would be "appropriate to expand the citie's [sic] motion to the entire issue of the Ground Water and Surface Water Relationship, including whether or not the 'Winters Doctrine' applies to ground water."[3] Minute Entry, November 20, 1987, at App. F3.

In a subsequent minute entry, the court identified a total of eight issues it intended to resolve concerning the interrelationship between groundwater and surface water. Among these issues, the court identified the question: "Does the 'Winters' Doctrine of Federal Reserved Rights apply to percolating ground water under and/or outside of a federal reservation, how does it apply and does it apply only to the reduction of surface water resources and/or groundwater resources beneath the federal reservation?" Minute Entry dated January 19, 1988, at App. E3.

After these questions were briefed and argued, the court issued its September 9, 1988 Order, ruling on each of the eight issues identified in its prior minute entry. On the question of whether the *Winters* Doctrine applies to percolating groundwater, the court ruled that "federal reserved water rights *apply to both surface water and groundwater sources on and off the reservation* whose diversion affects reservation sources to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [Practicably Irrigable Acreage] if the land is an Indian reservation." App. D23 (emphasis added). Thus, the superior court ruled, without reference to any specific

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[3] The "Winters Doctrine" is the name frequently applied to the federal implied reservation of water rights doctrine. It stems from the first case in which this Court recognized the doctrine, *Winters v. United States*, 207 U.S. 564 (1908).

federal reservation, that the doctrine of implied reservation of water rights extends to groundwater, both on and off a reservation.

C. Proceedings Before the Supreme Court of Arizona.

On September 26, 1989, the Supreme Court of Arizona adopted its Special Procedural Order Providing for Interlocutory Appeals and Certifications ("Special Procedural Order"). *See* App. C. The court made this order specifically applicable to appeals of "any ruling of the superior court" in the Gila River Adjudication. App. C1. The text of the Special Procedural Order explains the court's purpose in issuing the order:

> The purpose of this order is to establish a procedure for early review of all substantial questions in this general adjudication of water rights. Early appellate review may avoid wasteful trial court proceedings, may result in substantial savings of time or expense, or may for other reasons be in the interests of justice.

App. C8.

After issuance of the Special Procedural Order, numerous parties petitioned the Supreme Court of Arizona for review of various aspects of the superior court's September 9, 1988 Order. On September 11, 1990, the Supreme Court of Arizona granted review of six specific issues that it "reformulated" from among the many petitions filed regarding the superior court's order. *See* Orders Concerning Petitions for Interlocutory Review, App. B. Two of these six issues were the subject of the November 19, 1999 opinion (the "Opinion Below") that has prompted the filing of this Petition. These issues, the fourth and fifth identified by the court, were stated as:

4. Is non-appropriable groundwater subject to federal reserved rights?

5. Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?

Orders Concerning Petitions for Interlocutory Review, App. B3.[4]

The Supreme Court of Arizona answered both questions in the affirmative. Opinion Below, ¶ 43 (App. A30). In doing so, the court expressly rejected the application of existing state groundwater law as its rule of decision for determining the scope of federal rights to groundwater. Opinion Below, ¶ 25 (App. A21-A22).

Because the Supreme Court of Arizona's rejection of state law as the governing rule of decision conflicts with the prior decisions of this Court, will be gravely disruptive to the citizens of the State of Arizona, and has serious implications for water users throughout the western United States (and indeed throughout the Nation), Petitioners pray for the issuance of a writ of certiorari to review the judgment of the court below.

D. Finality of the Opinion Below.

The Supreme Court of Arizona's judgment on Issue 4, although interlocutory, is final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a). Review of the question presented in this Petition at this time is consistent with the prior decisions of this Court on the

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[4] Although the Supreme Court of Arizona decided Issues 4 and 5 together in the Opinion Below, Petitioners seek review of only Issue 4 at this time.

issue of finality of judgments. Specifically, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court recognized "at least four categories" of cases in which it accepted jurisdiction under circumstances where "the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. . . . " *Id.* at 477. In these cases, this Court "has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* Given the nature of the Gila River Adjudication, the federal issues finally decided by the Supreme Court of Arizona in the Opinion Below satisfy this Court's standards of finality and justify review at this time.

The fourth category of cases identified in *Cox Broadcasting* most directly addresses the circumstances presented in this Petition. In such cases, "if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 482-83.

On the question presented to the Court in this Petition, a refusal immediately to review the Opinion Below will seriously erode at least three important federal policies.[5] The first of these policies is found in the *Winters* Doctrine itself, which is based on a reservation-specific analysis of the purpose for which particular lands were

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[5] Each of these policies will be discussed in greater detail below under the heading "Reasons for Granting the Petition."

reserved. The Opinion Below is inconsistent with this policy because the Supreme Court of Arizona created a new federal reserved right to groundwater without considering the purposes of any specific reservation. The second policy impacted by the Opinion Below is the long-standing recognition, both by this Court and by Congress, of the need to integrate, to the greatest extent possible, the water rights claims of federal reservations within existing state-law based systems of water rights. Finally, the third federal policy impacted by the Opinion Below is this Court's repeated admonition that, with few exceptions, nondiscriminatory state law, rather than federal common law, should be adopted as the rule of decision for determining rights under federal law. All of these policies are frustrated by the Opinion Below.

Cox Broadcasting identifies *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), as exemplifying the fourth category of interlocutory decisions that satisfy the finality requirement. In *Langdeau*, this Court reviewed an interlocutory decision of the Supreme Court of Texas on the applicability of a federal venue statute. In deciding to exercise its jurisdiction, this Court stated:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Id. at 558.

Similarly, review at this time of the question presented in this Petition would serve the policy underlying the finality requirement by clarifying the legal standards by which federal rights to groundwater are to be determined. Furthermore, unless the erroneous conclusions of the Supreme Court of Arizona are reversed at this time, thousands of claimants in the Gila River Adjudication will be forced to endure "long and complex litigation which may all be for naught" if consideration of the question of federal reserved rights to groundwater "is postponed until the conclusion of the proceedings." *Id.* Given the scope of this case and the importance of the question presented here, this burden would be imposed on thousands of claimants for many years to come.[6]

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[6] The Supreme Court of Arizona foresaw the need for timely review by this Court of at least some issues to be considered under the Special Procedural Order. In *Gila I*, the court explained:

> The Special Procedural Order was promulgated to provide a mechanism to review the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication. *In a case of this magnitude, which is expected to continue for at least three or four decades,* it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew.
>
> . . .
>
> In certain circumstances, such interlocutory decisions are reviewable by the United States Supreme Court. *See Cox Broadcasting v. Cohn.*

Gila I, 830 P.2d at 445, n. 2 (emphasis added). This language is equally persuasive here and counsels in favor of this Court exercising its jurisdiction under 28 U.S.C. § 1257(a) at this time.

Finally, this Court also has recognized that, given the "virtually unique" nature of water rights adjudications, *San Carlos Apache Tribe*, 463 U.S. at 571, interlocutory review of federal reserved water rights claims asserted in ongoing state court proceedings may be necessary. On at least two occasions, this Court has issued writs of certiorari to review the interlocutory decisions of state supreme courts regarding the nature or extent of specific federal reserved water rights. *See Wyoming v. United States*, 488 U.S. 1040 (1989), *affirmed without opinion*, 492 U.S. 406 (1989); *New Mexico*, 438 U.S. 696. Because issues of equal significance and urgency are raised in this Petition, the Opinion Below should be considered final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE PETITION

This Petition should be granted, and a writ of certiorari issued, for two principal reasons. First, the Supreme Court of Arizona "has decided an important question of federal law that has not been, but should be, settled by this Court," and it has done so in a way that "conflicts with relevant decisions of this Court." Rule 10(c), Rules of the Supreme Court of the United States. The federal question presented here is vitally important because the Opinion Below has serious implications for not only millions of Arizona citizens, but also for groundwater-dependent communities throughout the United States. Second, the Opinion Below decided this important question of federal law in a way that "conflicts with the decision of another state court of last resort. . . . " Rule 10(b), Rules of the Supreme Court of the United States.

I. The Supreme Court of Arizona's Decision Frustrates Clear Federal Policies and Conflicts with Controlling Decisions of this Court.

A. The Opinion Below Conflicts with this Court's *Winters* Doctrine by Finding a Federal Reserved Right to Groundwater Without Considering the Purposes of Any Specific Reservation.

The nature and extent of reserved water rights associated with federal reservations is undeniably a question of federal law. *See, e.g., San Carlos Apache Tribe*, 463 U.S. at 571, *Cappaert v. United States*, 426 U.S. 128, 145 (1976). However, the *Winters* Doctrine is simply a rule of construction founded on a particularized scrutiny of the congressional enactments, Executive Orders, treaties or agreements that established particular federal reservations. The Doctrine does not authorize recognition of reserved water rights in the absence of a reservation-specific showing of the purpose for which each reservation was set aside.

Nevertheless, the Supreme Court of Arizona held, without reference to any specific Act of Congress, Executive Order or treaty establishing a federal reservation in the State of Arizona, that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." Opinion Below, ¶ 43 (App. A, p. 30). Because this holding was rendered "in the abstract," *id.*, ¶ 31 (App. A, p. 24), and without aid of a record establishing the purposes of any federal reservation, it is directly contrary to this Court's prior decisions regarding federal reserved rights.

In each of the cases where this Court has recognized reserved water rights for specific federal reservations, it has done so only after careful review of the underlying

legal instruments by which the reservation in question was created. *See New Mexico*, 438 U.S. at 700-702; *Cappaert*, 426 U.S. at 131-132, 139-141; *Arizona v. California*, 373 U.S. 546, 597 (1963); *United States v. Powers*, 305 U.S. 527, 532-33 (1939); *Winters*, 207 U.S. at 575-76 (1908). Thus, reserved rights to surface water have been found to exist only by virtue of the specific intentions of Congress or the executive branch when particular federal lands are reserved. For example, in *Winters* the Court held that the existence of any reserved water rights "turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation," and the Court's "construction of this agreement." 207 U.S. at 575-76. Similarly, in *Arizona v. California*, the Court noted that Indian reserved right claims "are governed by the statutes and Executive Orders creating the reservations." 373 U.S. at 597. In *Cappaert*, the Court engaged in detailed scrutiny of the Executive Order establishing Devil's Hole National Monument to determine whether there was an "inferred" federal intent to reserve water for Devil's Hole. 426 U.S. at 131-132, 139-141. In *New Mexico*, the Court noted that "careful examination is required" of "both the asserted water right and the specific purposes for which the land was reserved. . . . both because the reservation [of water] is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water." 438 U.S. at 700-702.

These cases confirm that courts must ascertain the federal purpose for which a reservation was created, and only then determine whether a reserved right exists. The Opinion Below omitted this required step and announced

a new federal common law rule recognizing a reserved right to groundwater without reference to the federal purpose behind creation of any specific reservation. The Opinion Below should be reversed on this basis alone.

B. The Opinion Below Fails to Integrate Federal Groundwater Rights with Existing State Groundwater Law.

Even in cases where reserved water rights might be expressed or implied for a particular reservation, those rights must still be integrated, to the maximum possible extent, within the existing state law-based system of water rights prevailing in the state in question. With regard to surface waters, for instance, *Cappaert* instructs that when the federal government reserves land for a specific federal purpose, "by implication, [it] reserves *appurtenant water then unappropriated* to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires *a reserved right in unappropriated water* which vests on the date of the reservation and is *superior to the rights of future appropriators.*" 426 U.S. at 138 (emphasis added). Thus, the rule of construction recognizing federal reserved rights has consistently limited those rights to "unappropriated water" available on the date the reservation is created, and makes such rights superior only in relation to "future appropriators."

While *Cappaert* held that the federal government could enjoin uses of groundwater or surface water by *future* appropriators that interfere with the *prior* federal right to surface water, no case has ever suggested that federal reserved rights are superior to water rights existing under state law on the date the federal reservation was created. Indeed, rather than ensuring that the federal

right will be *first* in line for water, the *Winters* Doctrine merely ensures that the reserved land will have a *place* in line. Quite simply, the *Winters* Doctrine is not a guarantee of water, but only a rule of construction under which federal water rights are to be integrated into existing state law-based systems of water rights.

However, the Opinion Below explicitly rejects the application of Arizona groundwater law in determining the nature of federal rights to groundwater. Opinion Below, ¶ 25 (App. A20-A21). By doing so, the Supreme Court of Arizona has extended the *Winters* Doctrine in a manner that seeks to *guarantee* a supply of water to federal reservations, rather than simply provide those reservations with a nondiscriminatory right of access to a shared resource. This extension of the *Winters* Doctrine must stand, if at all, on heretofore unrecognized principles of general federal common law. These newfound principles were adopted without regard for the potential impact on state law-based groundwater rights, and without any attempt to logically integrate the disparate federal and state-law rights. By its actions, the Supreme Court of Arizona has ignored the prior decisions of this Court, and for this additional reason the Opinion Below should be reversed.

C. The Opinion Below Rejects State Law as a Rule of Decision and Therefore Conflicts with *Kimbell Foods* and *Wilson*.

It has long been an established principle that "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Moreover, as this Court has repeatedly noted, even in situations where "federal law ultimately controls the issue . . . it is still true that

'[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy. . . . ' " *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979), *quoting United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

Consistent with these principles, this Court has established a three part test for determining when it is appropriate to adopt a uniform nationwide federal rule or, instead, to rely on applicable state law as the rule of decision for determining the scope of a federal right or statute. Given the fact that no prior decision of this Court has recognized a reserved right to groundwater, and in light of the Supreme Court of Arizona's unprecedented expansion of the *Winters* Doctrine, its decision to recognize a new federal right immune from otherwise relevant, nondiscriminatory state law must be measured against this test. As articulated in *Kimbell Foods*, the test requires a consideration of:

1. Whether there is a "need for a nationally uniform body of law." If there is no such need, "state law may be incorporated as the federal rule of decision."
2. Whether "application of state law would frustrate specific objectives of . . . federal programs;" and
3. "[T]he extent to which application of a federal rule would disrupt commercial relationships predicated on state law."

Kimbell Foods, 440 U.S. at 728-29. Other decisions of this Court have confirmed that the situations in which it is appropriate to adopt a "special federal rule" are:

> "few and restricted," limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." Our cases uniformly require the existence

> of such a conflict as a precondition for recognition of a federal rule of decision. Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict.

O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (citations omitted).

In *Wilson*, this Court applied the *Kimbell Foods* test to a federal question very similar to the question at issue in this Petition. Specifically, in *Wilson*, the Court considered the applicability of state law as a rule of decision for determining whether the Omaha Indian Tribe retained ownership of a portion of its reservation that had been physically separated from the remainder of the reservation by the shifting channel of the Missouri River. *Wilson*, 442 U.S. at 656-57. The question turned on the doctrines of accretion and avulsion, and the answer depended on whether Nebraska law would be incorporated as the rule of decision or, instead, a special federal rule would be created. *Id.* at 658.

Applying the first element of the *Kimbell Foods* test, the Court concluded that:

> [W]e perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, *we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law.* It is true that [State laws] may differ . . . but *as long as the applicable standard is applied even-handedly to particular disputes,* we discern no imperative need to develop a general body of

> federal common law to decide cases such as this. . . .

Wilson, 442 U.S. at 673 (emphasis added). This conclusion applies with equal force to the issue raised in this Petition. If rules affecting ownership of land by the federal government and Indian tribes are to be discerned from applicable state law, then certainly the rules affecting the water rights of those lands also should be discerned by reference to state law. As long as that law is "applied even-handedly to particular disputes," *id.*, there is no reason to depart from it in favor of a federal common law rule. As discussed below, Arizona groundwater law does apply even-handedly to both federal and non-federal landowners. Therefore, it should have been adopted as the rule of decision for determining the nature of federal rights to groundwater in Arizona.

On the second element of the *Kimbell Foods* test, *Wilson* noted that "given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests." *Id.* Thus, the Court concluded that application of state law on a question involving title to Indian property would not frustrate the specific objectives of any federal program.

This conclusion also applies with equal, if not greater, force to the issue raised in this Petition. Both this Court and Congress have repeatedly and clearly indicated not only the desirability but the need for integration of federal claims into a single, coherent system of water rights.[7] In *Colorado River Water Conservation Dist. v.*

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[7] *See San Carlos Apache Tribe*, 463 U.S. at 551; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 525

United States, the Court particularly noted its concern with "avoiding the generation of additional litigation through permitting *inconsistent dispositions of property*. This concern is heightened with respect to water rights, the relationships among which are highly interdependent." *Id.*, 424 U.S. at 819 (emphasis added). Rather than avoiding "inconsistent dispositions of property" and additional litigation, the Opinion Below would create two inconsistent rules governing the use of groundwater in Arizona. These rules would apply unequally to a common resource shared by neighboring landowners – obviously a situation at odds with longstanding federal policy favoring integration of federal water rights within existing state water law systems. Only if Arizona groundwater law is adopted as the rule of decision for federal rights (thus giving both federal and non-federal claimants equal access to and rights in groundwater), will federal policy in this arena be advanced.

As for the third element of the *Kimbell Foods* test, *Wilson* concludes:

> Private landowners rely on state real property law when purchasing real property. . . . There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer . . . in disputes involving Indians on one side and possibly quite different

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(1971); McCarran Amendment, *quoted in* "Statutory Provisions Involved," *supra*.

> answers with respect to neighboring land where non-Indians are the disputants.

Wilson, 442 U.S. at 674.

Precisely this same reasoning supports incorporation of state law as the rule of decision to determine the nature of federal rights to groundwater in Arizona. To do so would avoid upsetting the reasonable expectations of millions of Arizonans who are dependent on groundwater, or subjecting them to the vagaries of being located adjacent to or near Indian or other federal reservations. It would also avoid having the answer to the question of what groundwater rights are held by a landowner depend on whether that landowner is the federal government, an Indian tribe, or a non-federal party. Only by applying Arizona groundwater law as the rule of decision can such arbitrary results be avoided.

When the elements of the *Kimbell Foods* test are applied here as they were in *Wilson*, the inescapable conclusion is that state law should have been adopted by the Supreme Court of Arizona in determining the nature of federal rights to groundwater. However, with only passing reference to *Kimbell Foods* (*see* Opinion Below, ¶ 25 [App. A21]) and *Wilson* (*id.*, ¶ 28 [App. A22]), the court rejected state law as its rule of decision in favor of its own concept of the nature of federal rights to groundwater. Because the Opinion Below is contrary to the *Kimbell Foods* test, it should be reversed by this Court.

II. This Issue is Crucial to Millions of Arizona Citizens as Well as the Citizens of Many Other States.

The question presented in this Petition is not simply an academic debate. To the contrary, this issue is of vital importance to the vast majority of the citizens of Arizona

who are dependent, in whole or in part, on groundwater, and who may be affected by the groundwater claims of one or more of the dozens of large federal reservations located throughout the state. Federal lands, including both Indian and non-Indian federal reservations, encompass approximately 71% of the state of Arizona. *See* Univ. of Ariz., *Arizona Statistical Abstract*, pp. 174-77 (1993). In contrast, only 17% of the state is in private ownership. *Id.*[8] Yet the vast majority of the state's population resides on this limited private land base. The water supplies of the Gila River Basin are a common resource that must be shared by both federal and non-federal claimants.[9]

The Opinion Below, by sanctioning a new federal groundwater right inconsistent with the state law rights exercised by most of the citizens of the state, will foster confrontation rather than cooperative sharing of these resources. Furthermore, the Opinion Below also may affect groundwater rights and uses in other states, particularly those that do not recognize appropriative rights to groundwater. For both of these reasons, this Petition should be granted and the Opinion Below reversed.

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[8] The remainder is owned by the State of Arizona. *Id.*

[9] A second general stream adjudication is pending in the Little Colorado River Basin in northeastern Arizona. Although the issue addressed in this Petition arose in the Gila Adjudication, the decision of the Supreme Court of Arizona will also be binding on claimants in the Little Colorado Adjudication. The Little Colorado Basin comprises approximately 21,000 square miles in Arizona, and more than 69% of this land is in federal or Indian ownership. *See* Arizona Department of Water Resources, *Hydrology of the Little Colorado River Basin*, pp. 2-1, and 3-4 through 3-14 (1989).

A. The Opinion Below is Inconsistent with Arizona Groundwater Law and Will Arbitrarily Impact Arizona Groundwater Users.

Arizona has long adhered to a bifurcated system of water rights under which surface waters and "subflow" are subject to the doctrine of prior appropriation, while percolating groundwater is subject to the doctrine of reasonable use. *See Gila II*, 857 P.2d at 1240. The prior appropriation doctrine was recognized in the statutory law of the Territory of Arizona as early as 1864. *See Maricopa County Municipal Water Conservation Dist. v. Southwest Cotton Co.*, 4 P.2d 369, 373 (Ariz. 1931). The doctrine is currently embodied in A.R.S. § 45-141.A, which provides that "[t]he waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels . . . and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use. . . . "

In contrast, "percolating" groundwater is not subject to the prior appropriation doctrine in Arizona. *See Gila II*, 857 P.2d at 1241. Instead, "underground water has been governed by the traditional common law notion that water percolating generally through the soil belongs to the overlying landowner, as limited by the doctrine of reasonable use." *Id.* at 1240. That doctrine allows the withdrawal and use of groundwater "so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining landowner for a resulting damage." *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953).

Arizona's common law doctrine of reasonable use was statutorily confirmed in 1980[10] when the Arizona Legislature enacted the Groundwater Management Act and Groundwater Code. *See* A.R.S. § 45-401 *et seq.* The doctrine of reasonable use remains the law of Arizona today, except in certain areas of the state, designated "Active Management Areas," where the Legislature has imposed the extensive regulatory requirements of the Groundwater Code on all aspects of the withdrawal and use of groundwater in order to halt excessive groundwater depletion. The state has not attempted to apply the provisions of the Groundwater Code on federal reservations located within Active Management Areas.[11] However, the common law doctrine of reasonable use, as confirmed in A.R.S. § 45-453, applies in all other areas of the state, including federal reservations. Application of Arizona's doctrine of reasonable use as the rule of decision for determining the nature of federal rights to groundwater would allow all federal reservations to withdraw and use groundwater for the "beneficial enjoyment" of those reservations. This is the same right granted to all other landowners in the state, and would therefore apply "even-handedly" to both federal and non-federal groundwater users. *Wilson*, 442 U.S. at 673.

This entire body of state law was rejected by the Supreme Court of Arizona as a rule of decision for determining the nature of federal rights to groundwater. *See*

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[10] *See* A.R.S. § 45-453 (quoted in "Statutory Provisions Involved," *supra*).

[11] This case does not present the question whether the state could, under a properly crafted and administered regulatory scheme, apply essential provisions of the Groundwater Code on federal reservations.

Opinion Below, ¶ 25 (App. A20-A21). In doing so, the court asserted that "the Supreme Court [of the United States] has defined the reserved rights doctrine as an exception to Congress's deference to state water law." *Id.* The court justified this conclusion by asserting that "state law cannot be applied to destroy the federal government's right to water on its lands." *Id.* These conclusions demonstrate that the Supreme Court of Arizona misperceived both Congress' (and this Court's) views on the interrelationship between state law and federal reserved rights, and the effect that application of state law as the rule of decision would have on those federal rights.

Petitioners do not assert that state law in any way controls, or can be "applied to destroy," federal rights to groundwater. To the contrary, Petitioners assert that, *as a matter of federal law*, Arizona's doctrine of reasonable use should be applied as the rule of decision for determining the nature of federal rights to groundwater. Thus, state law does not usurp federal law on this issue. Rather, " 'state law furnishes an appropriate and convenient measure of the content of federal law.' " *Wilson*, 442 U.S. at 672, n. 19 (*quoting* Hart & Wechsler's *The Federal Courts and the Federal System*). Because the Supreme Court of Arizona failed to undertake the *Kimbell Foods* analysis, its rejection of state law in favor of a free-standing federal common law right should be reversed by this Court.

B. The Opinion Below, if Adopted as Precedent in Other States, Will Result in Conflicts with State Laws Governing Allocation and Management of Groundwater Throughout the United States.

The impact of the Opinion Below is unquestionably enormous in the State of Arizona. However, if adopted as

precedent elsewhere, its flawed reasoning may also adversely affect the citizens of many other states. Throughout the Nation, each state has developed its own rules and doctrines for determining rights to groundwater, and many have created statutory schemes for managing groundwater resources. *See* Robert E. Beck, *Waters and Water Rights*, Vol. 3, Part IV (1991). These rules, doctrines and statutory schemes vary from state to state, depending on local conditions and needs. *Id. Cf., California v. United States*, 438 U.S. 645, 648 (1978) ("The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climatic regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences.")

The Opinion Below would support creation of a federal common law right to groundwater in virtually any state, and in each instance would sanction a conflict between that federal right and whatever rights exist under the laws of the state in question. Just as in Arizona, such a result would conflict both with this Court's consistent "judicial policy" favoring application of state law as the rule of decision for determining federal rights, *Kimbell Foods*, 440 U.S. at 728, and its repeated recognition of the need to address federal and non-federal claims to water in a unified, coherent system of water rights. *See, e.g., Colorado River Water Conservation Dist.* It would also be inconsistent with this Court's recognition of "the desirability of state and local management of ground water." *Sporhase v. Nebraska*, 458 U.S. 941, 952 (1982). The fact that the Opinion Below may lead to conflicts between state and federal rights in virtually any other state in the

Nation provides additional justification for reversal of that decision by this Court.

III. The Opinion Below Conflicts with a Prior Decision by the Supreme Court of Wyoming.

In rendering its decision on Issue 4, the Supreme Court of Arizona considered and rejected a prior decision on the same subject by the Supreme Court of Wyoming. That decision, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), held that "the reserved water right doctrine does not extend to groundwater. . . . " *Id.* at 100. In the Opinion Below, the Supreme Court of Arizona found the Wyoming court's reasoning unpersuasive and therefore rejected its holding. Opinion Below, ¶ 17 (App. A17).

This conflict between the Opinion Below and the Supreme Court of Wyoming's decision in *Big Horn*, and the implications of that conflict, were recently addressed by a judge of the Supreme Court of Montana in *Confederated Salish and Kootenai Tribes v. Clinch*, 56 Mont. St. Rep. 1356, 1999 Mont. LEXIS 346 (1999) (Rodegherio, J., dissenting). In *Clinch*, the Supreme Court of Montana considered the potential impact of a state statute on unquantified federal reserved water rights. Judge Rodegherio dissented from the majority opinion because the majority was "in effect, entering a permanent injunction without holding a factual hearing." *Id.*, 1999 Mont. LEXIS 346, at 17-18.

In addressing the conflict between Wyoming and Arizona, Judge Rodegherio stated that "[t]he majority's holding apparently precludes [the state water permitting agency] from issuing permits for groundwater use in this

fast growing area of the state even though uncertainty exists as to whether groundwater is included within the reserved rights doctrine." *Id.*, at 18-19 (citing both *Big Horn* and the Opinion Below). Judge Rodegherio also noted that "[w]ithout analysis, the majority apparently assumes that groundwater is included within the Tribes' reserved water right." *Id.* He then concluded:

> The practical consequences of the majority's decision will be significant and will deprive some Montana citizens of one of life's basic necessities, the use of water. Pervasive, unquantified Indian and non-Indian reserved water right claims exist throughout Montana. The broad sweep of the majority decision issued in a factual vacuum is not appropriate.

Id., at 19-20.

As *Clinch* demonstrates, the conflict between the Arizona and Wyoming Supreme Courts has caused "uncertainty" over the issue of reserved rights in groundwater. That uncertainty has potentially severe consequences for citizens of not only Arizona, but many other states as well. This important and unsettled federal question should be clarified by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for writ of certiorari.

Dated, Phoenix, Arizona, February 17, 2000.

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In The OFFICE OF THE CLERK

Supreme Court of the United States

PHELPS DODGE CORPORATION, et al.,

Petitioners,

v.

THE UNITED STATES, et al.,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, et al.,

Petitioners,

v.

THE UNITED STATES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	)	Supreme Court Nos. WC-90-0001-IR through WC-90-0007-IR (Consolidated) & WC-79-0001 through WC-79-0004 (Consolidated)
	)	Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated)
	)	**OPINION**
	)	(Filed Nov. 19, 1999)

Interlocutory Review of September 30 [sic], 1988 Order
Superior Court in Maricopa County
The Honorable Stanley Z. Goodfarb, Judge (retired)

Issue 4: Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law?

Issue 5: Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights?

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¶ 1 In the third of a series of interlocutory opinions in this comprehensive general stream adjudication, we address two questions: Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law? Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights? We answer both questions in the affirmative.

I. PROCEDURAL HISTORY

¶ 2 The purpose of a comprehensive general stream adjudication is to determine "the nature, extent and relative priority of the water rights" of all who use the water of a "river system and source." Ariz. Rev. Stat. Ann. ("A.R.S.") §§ 45-251(2), 252(A); *see also* [sic] U.S.C. § 666 (1982). The underlying adjudication is a consolidated effort to achieve that purpose with respect to waters within the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz, and San Pedro watersheds. The Little Colorado watershed is the subject of a similar adjudication.

¶ 3 The pertinent waters within a "river system and source" are (1) those subject to prior appropriation and (2) those subject to claims based on federal law. A.R.S. § 45-251(4). A substantial task is to determine the extent to which each category extends to hydrologically connected underground water pumped from wells. *In re the General Adjudication of All Rights to Use Water in the Gila River Sys. ("Gila River II")*, 175 Ariz. 382, 386, 857 P.2d 1236, 1240 (1993).

¶ 4 A detailed procedural history of this case may be found in *Gila River II*, 175 Ariz. at 384-86, 857 P.2d at 1238-40, and *In the Matter of the Rights to the Use of the Gila River ("Gila River I")*, 171 Ariz. 230, 232-33, 830 P.2d 442, 444-45 (1992).[1] It suffices here to state that in 1988 the

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[1] For additional procedural history, see *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 558-60 (1983), and *United States v. Superior Court*, 144 Ariz. 265, 270-71, 697 P.2d 658, 663-64 (1985), which jointly uphold the jurisdiction of the Arizona

trial court issued rulings on a number of questions concerning the relationship of groundwater and surface water. The trial court's ruling generated multiple petitions for interlocutory review, leading this court to accept six issues for review.[2] We resolved issue 1 in *Gila River I*, upholding procedures that the trial court established to make this massive case more manageable. 171 Ariz. at 243-44, 830 P.2d at 455-56. We resolved issue 2 in part in *Gila River II*; there we affirmed the conclusion that water constituting "subflow" is the only underground water subject to appropriation under Arizona law, but disapproved the standard that the trial court adopted to distinguish subflow from non-appropriable "percolating

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courts to include federal parties in a comprehensive general stream adjudication.

[2] We defined the six issues as follows:

1. Do the procedures for filing and service of pleadings adopted by the trial court in its Pre-trial Order Number 1 comport with due process under the United States and Arizona Constitutions?
2. Did the trial court err in adopting its 50%/90 day test for determining whether underground water is "appropriable" under A.R.S. § 45-141?
3. What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?
4. Is non-appropriable groundwater subject to federal reserved rights?
5. Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?
6. Must claims of conflicting water use or interference with water rights be resolved as part of the general adjudication?

groundwater," remanding the standard to be reshaped after further hearings. 175 Ariz. at 392-93, 857 P.2d at 1246-47.

¶ 5 After issuing *Gila River II*, we interrupted consideration of the six issues and accepted special action jurisdiction to resolve a challenge to the constitutionality of Arizona statutes enacted in 1995 that attempted comprehensive procedural and substantive changes to Arizona's surface water law. *San Carlos Apache Tribe v. Super. Ct.*, 193 Ariz. 195, 972 P.2d 179 (1999) (holding retroactive changes unconstitutional in substantial part). We then took jurisdiction of another special action to determine whether the trial court may consult *ex parte* with the Department of Water Resources in its statutory role as technical adviser to the court. *See San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, 977 P.2d 790 (1999) (rejecting petition to disqualify trial court and director of Department). We now return to the original six issues and resolve issues 4 and 5.

II. ON GROUNDWATER, SURFACE WATER, SUBFLOW, AND THE RESERVED WATER RIGHTS DOCTRINE

¶ 6 The trial court held that federal "reserved rights" apply not only to surface water and subflow, appropriable categories under Arizona law, but also to non-appropriable groundwater. The court also held that federal reserved rights holders are entitled to protection from any off-reservation groundwater pumping that "significantly diminishes" the amount of water available to satisfy the purpose of the reservation. These rulings attribute more expansive water rights to federal claimants

than to those asserting claims pursuant only to state law. To explain this aspect of the trial court's decision and to set the context for our discussion, we review some history and terms.

A. Arizona's Bifurcated System of Water Rights

¶ 7 In *Gila River II*, we summarized the bifurcation of Arizona law respecting surface water and groundwater:

> [R]ights associated with water found in lakes, ponds, and flowing streams – surface water – have been governed by the doctrine of prior appropriation. . . . On the other hand, underground water has been governed by the traditional common law notion that water percolating generally through the soil belongs to the overlying landowner, as limited by the doctrine of reasonable use.[3]

175 Ariz. at 386, 857 P.2d at 1240.

¶ 8 Arizona does not entirely confine the doctrine of prior appropriation to surface waters. Our courts have extended prior appropriation to a category known as "subflow," historically defined as "those waters which

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[3] The doctrine of reasonable use permits an overlying landowner to capture as much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply. *See Bristor v. Cheatham*, 75 Ariz. 227, 237-38, 255 P.2d 173, 180 (1953); *see generally* R. Beck, 1 WATERS & WATER RIGHTS §§ 4.01 at 66, 4.05(c) at 72 (1991 & Supp. 1998).

slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream." *Id.* at 387, 857 P.2d at 1241 *(quoting Maricopa County Mun. Water Conserv. Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 96, 4 P.2d 369, 380 (1931) *("Southwest Cotton "))*. The notion of "subflow" is significant in Arizona law, for it serves to mark a zone where water pumped from a well so appreciably diminishes the surface flow of a stream that it should be governed by the same law that governs the stream. *Id.* at 96-97, 4 P.2d at 380-81.

¶ 9 Yet the notion of subflow is an artifice, as we acknowledged in *Gila River II,* that rests on a hydrological misconception. 175 Ariz. at 389, 857 P.2d at 1243. To pump well water from "lands under or immediately adjacent to a stream" is not, we now know, the only pumping that may significantly diminish surface flow. The hydrological connection of groundwater and surface water is sometimes such that groundwater pumped more distantly within an aquifer may have comparable effect. Leshy and Belanger[4] explain:

> When water is pumped from an aquifer by means of a well, it creates what is known as a "cone of depression." This is caused by the groundwater in the aquifer moving toward the well. If the material in the aquifer has a high transmissivity value, the cone of depression will

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[4] In *Gila River II,* we referred those seeking a detailed history of the evolution of Arizona water law to John D. Leshy & James Belanger, ARIZONA LAW WHERE GROUND AND SURFACE WATER MEET, 20 Ariz. St. L. J. 657 (1988).

> be wide and shallow. If, on the other hand, the aquifer does not easily transmit water, the cone of depression will be steep and narrow. If water is pumped continuously from the well, the cone of depression will become larger. If the water table is close enough to the earth's surface to allow this cone to cut into a surface stream, water from the stream would directly infiltrate into the ground, following the slope of the cone of depression until it reached the well. Even if the cone did not intersect the stream directly, it could affect the amount of water in the stream by intercepting water that would otherwise migrate toward the stream. This would cause less water to be available in the stream bed. If water were removed by pumping from a well and none were reintroduced, the water table would decline. If several wells were pumping, there would be a more rapid decline. Any time the rate of water withdrawn from an aquifer exceeds the rate of recharge, the water table will decline.

Leshy & Belanger, 20 Ariz. St. L.J. at 663-64.

¶ 10 Conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies. *Id.* at 659-60. In *Gila River II*, however, we declined to do so, explaining:

> [I]t is too late to change or overrule *[Southwest Cotton]* . . . . More than six decades have passed since *Southwest Cotton* was decided. The Arizona legislature has erected statutory frameworks for regulating surface water and groundwater

> based on *Southwest Cotton*. Arizona's agricultural, industrial, mining, and urban interests have accommodated themselves to those frameworks. *Southwest Cotton* has been part of the constant backdrop for vast investments, the founding and growth of towns and cities, and the lives of our people.

Gila River II, 175 Ariz. at 389, 857 P.2d at 1243. Limiting ourselves to "interpreting *Southwest Cotton*, not refining, revising, correcting, or improving it," we "reaffirm[ed] *Southwest Cotton's* narrow concept of subflow" and directed the trial court to devise a subflow standard on remand that "turns on whether the well is pumping water that is more closely associated with the stream than with the surrounding alluvium." *Id.* at 389-93, 857 P.2d at 1243-47.

B. *All Water Appropriable and All Water Subject to Claims Based Upon Federal Law*

¶ 11 A subflow standard, once it has been established, will serve to identify well-users who pump water subject to prior appropriation. But this adjudication is not limited to water subject to prior appropriation; it extends also to water subject to claims based on federal law. An adjudication such as this cannot achieve its comprehensive purpose without quantifying and prioritizing federal, as well as state law, claims.

> Since there is not enough water to meet everyone's demands, a determination of priorities and a quantification of the water rights accompanying those priorities must be made. Obviously, such a task can be accomplished only in a

> single proceeding in which all substantial claimants are before the court so that all claims may be examined, priorities determined, and allocations made.

See United States v. Super. Ct., 144 Ariz. 265, 270, 897 P.2d 658, 663 (1985).

¶ 12 Approximately two-thirds of the land in Arizona is federally held, much of it in trust for Indian tribes. *See* ARIZONA STATISTICAL ABSTRACT 173-177 (1993 ed.). The McCarran Amendment permits us to include federal claimants in the adjudication, for it permits the United States to participate in state court proceedings that comprehensively adjudicate "rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). In conformity with the McCarran Amendment, our general adjudication statute, A.R.S. § 45-252(A), authorizes determination of "the nature, extent and relative priority of the water rights of all persons in the river system and source." And A.R.S. § 45-251(4), as we have indicated, defines "river system and source" to include not only appropriable water, but "all water subject to claims based upon federal law."[5]

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[5] The City of Phoenix argues that our general adjudication statute permits us to adjudicate federal water claims only to the extent that they are claims to water that is appropriable under state law and, thus, that we lack jurisdiction to consider whether federal reserved rights extend to non-appropriable groundwater. We summarily reject this argument because it is contrary to the plain, conjunctive definitional language of A.R.S. § 45-251(4) and because such an interpretation would deprive this adjudication of the comprehensive quality that our general adjudication statute was intended to provide.

¶ 13 The rub is that, in order to adjudicate and quantify water rights based upon federal law, the Arizona courts must afford federal claimants the benefit, when state and federal law conflict, of federal substantive law. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) (state courts must apply federal substantive law to measure federal rights in state adjudication); *accord United States v. Super. Ct.*, 144 Ariz. at 276-77, 697 P.2d at 669-70. And the particular issues that we now consider arise pursuant to a doctrine of federal substantive law known variously as the "reserved water rights," the "reserved rights," or the "implied reservation" doctrine.

¶ 14 The reserved water rights doctrine provides:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Cappaert v. United States, 426 U.S. 128, 138 (1976). The doctrine applies not only to Indian reservations, but to other federal enclaves, such as national parks, forests, monuments, military bases, and wildlife preserves. *Id.* at 138-39; *Arizona v. California*, 373 U.S. 546, 601 (1963).

III. DO FEDERAL RESERVED RIGHTS EXTEND TO GROUNDWATER?

¶ 15 Moving from background to foreground, we consider the trial court's conclusion that the reserved water rights of federal claimants – when measured by federal substantive law – are not constrained by Arizona's bifurcated treatment of surface water and groundwater. According to the trial court, federal law establishes a reserved right to groundwater, if and to the extent that groundwater may be necessary to accomplish the purpose of a federal reservation.

¶ 16 The state law parties respond that the Supreme Court has never applied reserved rights to groundwater and that this court, if not obliged to do so, should decline to apply a federal doctrine so disjunctive to established doctrines of our state. In support of this argument, the state law parties cite the example of *In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988). In that general stream adjudication, the Supreme Court of Wyoming recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 99. Yet the court declined to find a reserved right to groundwater, stating in explanation only that it had been cited no previous decision which did so. *Id.* at 99-100.[6]

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[6] Some recorded decisions have, in fact, addressed the question, though their analysis was relatively terse. *See Tweedy v. Texas Co.*, 286 F. Supp. 383, 385 (D. Mont. 1986) ("the same implications" that support a reservation of surface waters in arid lands "would apply to underground waters as well"); *Gila*

¶ 17 We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so. Moreover, as the *Big Horn* court acknowledged, we do not write on a blank slate.

¶ 18 The reserved rights doctrine derives from *Winters v. United States*, 207 U.S. 564 (1908). There, the United States sued to enjoin upstream settlers in Montana from constructing or maintaining dams and reservoirs that diverted Milk River waters from flowing to the Fort Belknap Indian Reservation. *Id.* at 565. Although the reservation was created in 1888, before the upstream settlers arrived, the settlers claimed priority under Montana's law of prior appropriation, asserting that their diversion and beneficial use preceded all but a minor appropriation of waters for reservation use. *Id.* at 568-69. The Supreme Court rejected the settlers' argument. Observing that "[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be," the Court concluded that, in setting aside land for a reservation, the government had implicitly reserved sufficient water to accomplish the reservation's purpose. *Id.* at 577.

¶ 19 In *Cappaert*, the Court applied the reserved rights doctrine in a case that turned on the hydrological connection of surface water and groundwater. There, upon

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River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660, 699 (1986) ("Ground water under the Gila River reservation impliedly was reserved for the Indians.").

application by the United States, a federal district court had issued, and the Ninth Circuit had affirmed, an injunction restricting pumping from wells drilled on private ranch land bordering the Devil's Hole National Monument. The wells drew water from the same underground source as a pool within the monument where lived an endangered breed of fish. One purpose of the monument was to preserve the pool and its rare fish. *Id.* at 141. Upon evidence that pumping from the wells had lowered the pool's surface to a level that inhibited the spawning of the fish, the Supreme Court affirmed the district court's injunction, which restricted the ranch's pumping to the extent necessary to maintain the pool at a water level that sufficed to support the fish. *Id.*

¶ 20 Although the Ninth Circuit, in its *Cappaert* opinion, expressly determined that the reserved rights doctrine extends to groundwater,[7] the Supreme Court found it unnecessary to reach that question, explaining that the water in the pool was surface water. *Cappaert*, 426 U.S. at 142. Yet upon evidence that "federal water rights were being depleted because . . . the '[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle,' " the Court held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 142-43 (*quoting* C. Corker, *Groundwater Law, Management and Administration*, National Water Commission Legal Study No. 6, p. xxiv (1971)).

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[7] *See United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974).

¶ 21 In *Cappaert*, as before, the Supreme Court left the question of a reserved right to groundwater unresolved. The Court's decisions, however, provide guideposts toward our holding that such a right exists.

¶ 22 We find one guidepost in *Winters*, where the Court stressed that the arid lands of the Fort Belknap Reservation could not be made "inhabitable and capable of growing crops" without an implicit reservation of Milk River waters. *Winters*, 207 U.S. at 569. We find a similar guidepost in *Arizona v. California*, where the Court declared it "impossible to believe" that those who created the Colorado River Indian Reservation "were unaware that most of the lands were of the desert kind – hot, scorching sands – and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona v. California*, 373 U.S. at 599. The reservations considered in those cases depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life.

¶ 23 We find another guidepost to decision in the Supreme Court's association of surface and groundwater in *Cappaert* as "integral parts of the hydrologic cycle." *Cappaert*, 426 U.S. at 142. True, the Court identified the waters to be protected as the surface waters of the pool in Devil's Hole. But in contrast to prior cases where the use to be enjoined was an upstream diversion of surface

waters, in *Cappaert* the use to be enjoined was a pumping of groundwater from beneath adjoining land. The Court declined to differentiate one means of diversion from another. Instead, the Court held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. While *Cappaert* bears most directly upon our discussion of issue 5 in Part IV of this opinion, we find it helpful to our resolution of the present issue as well. That federal reserved rights law declines to differentiate surface and groundwater – that it recognizes them as integral parts of a hydrologic cycle – when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected.

¶ 24 In summary, the cases we have cited lead us to conclude that if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

¶ 25 The state law parties argue, however, that even if the reserved rights doctrine applies equally in principle to groundwater as to surface water, we should decline to extend the doctrine to groundwater out of deference to state water law. Where federal rights are at issue, a state court may adopt state law as the rule of decision if to do so would not frustrate or impair a federal purpose. *See*

United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979). Such is not the case here. To the contrary, the Supreme Court has defined the reserved rights doctrine as an exception to Congress's deference to state water law. *See United States v. New Mexico*, 438 U.S. 696, 714 (1978); *accord Cappaert*, 426 U.S. at 145; *see also United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 775 (1899) (state law cannot be applied to destroy the federal government's right to water on its lands).[8]

¶ 26 In *Winters*, the Supreme Court acknowledged the extensive cultivation, construction, and development that Montana settlers had undertaken in reliance upon diversions of water accomplished pursuant to state law. 207 U.S. at 569-70. Had the Court deferred to state law, the settlers would have prevailed. Instead, the Court concluded that the United States had exercised its power "to reserve the waters and exempt them from appropriation under the state laws." *Id.* at 577. In *Cappaert*, similarly, the Court acknowledged the extensive investment that the ranch land parties had made and the substantial employment generated by their wells. 426 U.S. at 133. The State Engineer, applying state law, had permitted the pumping

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[8] As evidence of the deference that the federal government traditionally accords state water law, the state law parties point to statutes such as the 1877 Desert Lands Act, in which Congress effected "a severance of all waters upon the public domain, not theretofore appropriated, from the land itself," and reserved the waters "for the use of the public under the laws of the states and territories." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162 (1935). The Supreme Court has held, however, "that the Desert Land Act does not apply to water rights on federally reserved land." *Cappaert*, 426 U.S. at 144 (*citing FPC v. Oregon*, 349 U.S. 435, 448 (1955)).

to continue, finding in part that further economic development served the public interest. *Id.* at 134-35. The Supreme Court, however, concluded that "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation." *Id.* at 145.

¶ 27 It is apparent from the case law that we may not withhold application of the reserved rights doctrine purely out of deference to state law. Rather, we may not defer to state law where to do so would defeat federal water rights.

¶ 28 The state law parties next argue, however, that deference to state law in this case would not defeat federal water rights. Specifically, they maintain that there has never been a need to reserve groundwater in a state that provides all overlying landowners an equal right to pump as much groundwater as they can put to reasonable use upon their land.[9] *Cf. Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 674 (1979) (court may borrow state law as rule of decision where under the circumstances there is no reason for beneficiaries of a federal right to have a privileged position over others).

¶ 29 This argument, however, overlooks that federal reserved water rights are by nature a preserve intended to "continue[ ] through years." *See Winters,* 207 U.S. at 577. In *Arizona v. California,* the Supreme Court affirmed that an implied reservation includes sufficient waters "to satisfy the future as well as the present needs of the Indian Reservations." *Arizona v. California,* 373 U.S. at 600.

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[9] *See supra* note 3.

The Court added that the reservation of waters applies to the "future requirements" of other types of federal reservation as well. *Id.* at 601. A theoretically equal right to pump groundwater, in contrast to a *reserved* right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers. *Cf. Washington Com. Passenger State Fishing Vessel Ass'n*, 443 U.S. 658, 676 n.22 (1979) ("[I]n light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' 'equal *opportunity*' to take advantage of a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all.")

¶ 30 Under the "reasonable use" doctrine, Arizona has consumed far more groundwater than nature can replenish. *See* ARIZONA DEP'T WATER RESOURCES, ARIZONA WATER RESOURCES ASSESSMENT: VOL. 1, INVENTORY AND ANALYSIS 9 (1994); Philip R. Higdon & Terence W. Thompson, *The 1980 Arizona Groundwater Management Code*, 1980 Ariz. St. L.J. 621, 623. The Department of Water Resources presented evidence to the trial court in this case of streams in transition from perennial to intermittent within the San Pedro and Upper San Pedro watersheds, of others nearing an ephemeral character, and of others in geographical "retreat." *See* ARIZONA DEP'T WATER RESOURCES, GILA RIVER SYSTEM GROUNDWATER-SURFACE WATER INTERACTION STUDY 31-32 (1987). Within the Lower Gila River watershed, groundwater tables have been so lowered as to sever the connection between ground and surface water. *See* Leshy & Belanger, *supra*, at 665-66. Some Indian reservations have been entirely "dewatered" by off-reservation pumping. *See Gila River Pima-Maricopa*

Indian Community v. United States, 9 Cl. Ct. 660, 665-66 (1986) (federal inaction and lack of tribal resources have enabled off-reservation developers to pump aquifers underlying some Indian reservations dry before the tribes could exercise their opportunity to pump groundwater). We therefore cannot conclude that deference to Arizona's law – and to the opportunity it extends all landholders to pump as much groundwater as they can reasonably use – would adequately serve to protect federal rights.

¶ 31 For the foregoing reasons, we hold that the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater. We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis. *See United States v. New Mexico*, 438 U.S. at 700.

¶ 32 Likewise, we do not now attempt to impose a standard upon the trial court for determining the purpose of any reservation. That standard, in our judgment, is not well-suited to abstract declaration and should instead emerge from testing in the solid context of the facts.[10]

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[10] Accordingly, we reject the Arizona Tribes' assertion that the Indian tribes have a reserved right to all of the waters

IV. PROTECTION AGAINST OFF-RESERVATION PUMPING

¶ 33 Next is the question what level of protection federal reserved right holders may claim against groundwater pumping that depletes their water supply. Are they limited, as the state law parties contend, to such protection as state law offers to state and private appropriators, or did the trial court correctly determine that the federal reserved right entails whatever broader protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation?

¶ 34 We answer this question first with respect to federal reservations that enjoy a reserved right to surface waters. As we have indicated in previous discussion, the common law of Arizona does not permit surface appropriators to protect their source of surface waters from depletion by groundwater pumping unless that pumping draws from the relatively narrow category of "subflow." *See supra* **¶¶** 8-10. More distant pumping within a common aquifer is governed by the relatively unfettered doctrine of reasonable use. *See supra* n. 3. Thus, for example, if *Cappaert* had arisen in Arizona, the application of state law might have precluded any restriction of adjoining pumping and have permitted Devil's Hole to be pumped dry.

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appurtenant to their reservations. In determining Indian treaty rights, the Supreme Court has rejected tribal claims to an "untrammeled right" to exploit scarce natural resources. *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 683 (1979); *see also Puyallup Tribe v. Washington*, 433 U.S. 165, 175 (1977).

¶ 35 The Salt River Project points out, however, that the standard for defining subflow awaits our further review and may conceivably be set sufficiently broadly to protect the surface water rights of some or all of the federal reservations.[11] We acknowledge that possibility, but at this stage of the adjudication we must provide for the contrary possibility as well. The question before us is not whether any particular reservation is *now* entitled to broader protection than state law provides.[12] The question is rather whether a federal reservation may invoke broader protection than state law provides if state law turns out to be inadequate to preserve the waters necessary to accomplish the purpose of the reservation.[13]

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[11] The Salt River Project contends for a broader standard of subflow than do other state law parties.

[12] We thus reject as premature the argument of the Arizona Tribes that we should immediately enjoin pumping that is depleting water beneath reservations. Until federal rights are quantified, it cannot be determined which if any of the tribes are entitled to such relief.

[13] We similarly approach the state law parties' argument that federal reserved rights holders may be adequately protected against groundwater depletion by the 1980 Groundwater Management Code, which restricts application of the reasonable use doctrine and mandates conservation measures in some parts of Arizona. For example, within "active management areas," it prevents drilling of new wells or increased pumping, and requires permits for changes in use. *See* A.R.S. § 45-411 *et seq.* (West 1994 & Supp. 1998). Reservations within active management areas will receive some degree of protection from the Code; reservations outside such areas will not. Whether any particular reservation receives adequate protection of its reserved water rights through the combination of Arizona's common and statutory law remains to be determined.

¶ 36 In our view, *Cappaert* provides an explicit answer to that question. First, *Cappaert* tells us that "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation." 426 U.S. at 145. Second, it tells us that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Cappaert*, 426 U.S. at 143.

¶ 37 What *Cappaert* holds with respect to the protection of surface waters, our discussion in Part III enables us to apply to the protection of groundwater as well. We have held that the federal reserved right extends to groundwater when groundwater is necessary to accomplish the purpose of a federal reservation. We similarly hold that once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right.

¶ 38 We thus affirm the trial court's conclusion that federal reserved rights holders enjoy greater protection from groundwater pumping than do holders of state law rights. We do not, however, read the case law to require a zero-impact standard of protection for federal reserved rights. The Supreme Court has repeatedly acknowledged that the reserved rights doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141; *see also United States v. New Mexico*, 438 U.S. at 700 n.4 (1978). In *Cappaert*, the Court affirmed an injunction "appropriately tailored . . . to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level

at Devil's Hole." *Id.* at 141. If injunctions should ultimately prove necessary in this case, they shall likewise be appropriately tailored to minimal need.

¶ 39 In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

V. CONCLUSION

¶ 40 In *United States v. Superior Court* we wrote, "In the scheme of priorities, the claims of the federal government . . . and of the Indians rank high. While the amount of water actually used by these entities may have been negligible until recent times, the magnitude of the right to use water on these lands has been far from negligible." 144 Ariz. at 270, 697 P.2d at 663. Today we add some greater definition to the rights we then described.

¶ 41 We recognize that our determination that reserved water rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses. State law parties may question how our present holding may be squared with our decision in *Gila River II* to retain Arizona's traditional bifurcation of the law of surface and groundwater. We are no less cognizant now than when we decided *Gila River II* that Arizona's agricultural, industrial, mining, and urban interests have accommodated themselves to the framework of *Southwest Cotton*. *Gila River II*, 175 Ariz. at 389, 857 P.2d at 1243. *See supra*

¶ 10. Yet there long has loomed the need – sometimes noted, sometimes wished away – for those same interests also to accommodate themselves to the water claims of the vast federal land holdings that surround them. *See Gila River I*, 144 Ariz. at 270, 697 P.2d at 663. For state law purposes in *Gila River II*, we found reason to retain a bifurcated framework despite the hydrological misconceptions upon which it rested. But federal law does not permit us that option in deciding the extent of federal reserved rights. As Leshy and Belanger wrote in summary of *Cappaert*, "For federal law, the question is one of hydrology, not legal compartmentalization." 20 Ariz. St. L.J. at 734.

¶ 42 We do not underestimate the burden that the State of Arizona will face in accommodating federal reserved water rights within its water resource management. Nor do we underestimate the burden that the trial court will face in adjudicating the extent and relative priority of such rights. Unless there is a comprehensive settlement, however, we must heed the lesson that "the best way out is always through."[14] To solve the conflict and uncertainty that reserved rights engender, we must quantify them, for we may not ignore them. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981); *see also* Mikel L. Moore & John B. Weldon, Jr., *General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow*, 27 ARIZ. L. REV. 709, 725 (1985) (the overarching purpose of the general stream adjudication statute is to provide the finality and certainty that can only be

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[14] R. Frost, *A Servant to Servants* in COMPLETE POEMS OF ROBERT FROST 83 (Holt, Rinehart and Winston ed. 1964)

achieved through a determination of all claims to water within the basin).

¶ 43 We answer issues 4 and 5 as follows: Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation. Holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.

NOEL A. FIDEL, Judge

CONCURRING:

THOMAS A. ZLAKET, Chief Justice

STANLEY G. FELDMAN, Justice

WILLIAM E. DRUKE, Chief Judge

JOHN PELANDER, Judge

Vice Chief Justice Charles E. Jones and Justices Frederick J. Martone and Ruth V. McGregor recused themselves; pursuant to Ariz. Const. art. VI, § 3, Judge Noel A. Fidel of Division One, Arizona Court of Appeals, Chief Judge William E. Druke and Judge John Pelander of Division Two, Arizona Court of Appeals, were designated to sit in their stead.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	) Supreme Court Nos. WC-90-0001-IR [Includes WC-90-0001-IR through WC-90-0007-IR (Consolidated) & WC-79-0001 (WC-1 through WC-4 Consolidated)]
	ORDERS CONCERNING PETITIONS FOR INTERLOCUTORY REVIEW
	(Filed Dec. 11, 1990)

Following the adoption of a Special Procedural Order Providing for Interlocutory Appeals and Certifications, petitions for review were filed in Maricopa County Superior Court Nos. W-1, W-2, W-3, and W-4 (consolidated). On June, [sic] 27, 1990, this Court consolidated the petitions. Thereafter, numerous cross-petitions, responses and an amicus brief were filed.

Having considered the many petitions, cross-petitions, responses and the amici briefs, the Court has determined to grant review on six issues. These issues were raised, in some form or another, in many of the filings, but have been reformulated by the Court. Thus, the individual questions presented in the petitions and cross-petitions will be ordered granted "to the extent they address the issues" the Court has decided to review and "denied in all other respects." As set forth in part H.1 of the Special

Procedural Order Providing for Interlocutory Appeals and Certifications, the Court's decision to deny review of any question has no precedential value.

Moreover, the Court intends to address these six issues separately. Thus, this order establishes a date for a pre-submittal conference at which matters relating to Issue Number 1 will be determined. Any party wishing to participate in the resolution of Issue Number 1 must file a notice of appearance no later than twenty days before that pre-submittal conference. At some later time, the Court will issue an order setting the date for the pre-submittal conference regarding the next issue. Parties wishing to participate in the resolution of that issue will file notices of appearance, and that issue will be briefed, argued and submitted. The process will proceed in this manner until all issues have been submitted and decided.

It is, therefore,

ORDERED: Granting review by way of interlocutory appeal of the following issues:

1. Do the procedures for filing and service of pleadings adopted by the trial court in its Pre-trial Order Number 1 comport with due process under the United States and Arizona Constitutions?

2. Did the trial court err in adopting its 50%/90 day test for determining whether underground water is "appropriable" under A.R.S. § 45-141?

3. What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?

4. Is non-appropriable groundwater subject to federal reserved rights?

5. Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?

6. Must claims of conflicting water use or interference with water rights be resolved as part of the general adjudication?

FURTHER ORDERED: Scheduling a pre-submittal conference regarding Issue Number 1 for Tuesday, February 12, 1991 at 10:00 a.m., as required by part H.3 of the Special Procedural Order for Interlocutory Appeals and Certifications.

FURTHER ORDERED: Any party to the adjudication desiring to participate in the interlocutory appeal of Issue Number 1 shall file a notice of appearance in this Court no later than twenty days prior to February 12, 1991, the date set for the pre-submittal conference, as required by part I of the Special Procedural Order for Interlocutory Appeals and Certifications. The notice of appearance shall indicate the party's position on the issue.

With respect to the individual petitions and cross-petitions for review:

WC-90-0001-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. SALT RIVER PROJECT/SALT RIVER VALLEY WATER USERS' ASS'N**

ORDERED: Petition for Interlocutory Review [Petitioner Salt River Project]:

Issue Number 1 = Review is granted to the extent it addresses the Court's Issues

Numbers 2 & 5; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issues Numbers 4 & 5; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 5 = Review is denied.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioner Church of Jesus Christ of Latter Day Saints]:

Review is granted and denied to the same extent that the petitions of City of Glendale, Roosevelt Water Conservation District, Arizona Public Service Company, Magma Copper Company, Farmers Investment Company, Cyprus Minerals Company, Apache Powder Company, City of Phoenix, Salt River Project Agricultural Improvement and Power District and the Salt River Valley Users' Association are granted and denied.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Vanosdell Farms]:

Review is granted and denied to the same extent that the petition of the Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association is granted and denied.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Gila Valley Irrigation District and Franklin Irrigation District]:

With respect to the issues in which it expressed "particular interest":

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is denied.

FURTHER ORDERED: Joinder in APS' Response to Petitions for an Order

Allowing an Interlocutory Appeal and Cross-Petition [Joint Respondent Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation District and New Magma Irrigation & Drainage District]:

Review is granted and denied to the same extent as the petitions of Arizona Public Service Co., Magma Copper Co., Farmers Investment Co., Roosevelt Water Conservation District and the City of Glendale are granted and denied.

FURTHER ORDERED: Cross-Petition and Response to Petitions for Interlocutory Review [Respondent Claimants Town of Wickenburg, Town of Gilbert, Cortaro-Marana Irrigation District, Cortaro Water Users' Association, Valencia Water Company, Bella Vista Water Company, Inc., and Bella Vista Ranches Limited Partnership]:

Issue A = Review is granted to the extent it addresses the Court's Issues Numbers 2, 3 & 4; review is denied in all other respects;

Issue B = Review is granted to the extent it addresses the Court's Issue Number 1; review is denied in all other respects.

WC-90-0002-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. BUCKEYE IRRIGATION CO. & BUCKEYE WTR CONSERVATION & DRAIN.**

ORDERED: Petition of Buckeye Irrigation Company and Buckeye Water Conservation & Drainage District to Review Portions of Superior Court Order of September 9, 1988:

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 4; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 5; review is denied in all other respects;

Issue Number 4 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 5 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 6 = Review is denied.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

WC-90-0003-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. CITY OF PHOENIX**

ORDERED: Petition for Interlocutory Review [Petitioner City of Phoenix]:

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is denied;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioner Church of Jesus Christ of Latter Day Saints]:

Review is granted and denied to the same extent that the petitions of City of Glendale, Roosevelt Water Conservation District, Arizona Public Service Company, Magma Copper Company, Farmers Investment Company, Cyprus Minerals Company, Apache Powder Company, City of Phoenix, Salt River Project Agricultural Improvement and Power District and the Salt River Valley Users' Association are granted and denied.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Gila Valley Irrigation District and Franklin Irrigation District]:

With respect to the issues in which it expressed "particular interest":

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is denied.

WC-90-0004-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. ARIZONA PUBLIC SVC/MAGMA COPPER CO/FARMERS INVESTMENT CO**

ORDERED: Petition for an Order Allowing an Interlocutory Appeal and

Request for a Briefing Schedule [Petitioners Arizona Public Service Co/ Magma Copper Company/Farmers Investment Company]:

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 4; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects.

FURTHER ORDERED: Joinder in APS Petition for Review and Notice of Intent to File Response to Petitions for Interlocutory Review [Joint Petitioner Cyprus Minerals Company and Apache Powder Company]:

Review is granted and denied to the same extent as the petition of Arizona Public Service Company, Magma Copper Company, and Farmers Investment Company is granted and denied.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioner Church of Jesus Christ of Latter Day Saints]:

Review is granted and denied to the same extent that the petitions of City of Glendale, Roosevelt Water Conservation District, Arizona Public Service Company, Magma Copper Company, Farmers Investment Company, Cyprus Minerals Company, Apache Powder Company, City of Phoenix, Salt River

Project Agricultural Improvement and Power District and the Salt River Valley Users' Association are granted and denied.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation & Drainage District and New Magma Irrigation & Drainage District]:

Review is granted and denied to the same extent as the petitions of Arizona Public Service Co., Magma Copper Co., Farmers Investment Co., Roosevelt Water Conservation District and the City of Glendale are granted and denied.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Gila Valley Irrigation District and Franklin Irrigation District]:

With respect to the issues in which it expressed "particular interest":

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is denied.

WC-90-0005-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. ROOSEVELT WATER CONSERVATION DISTRICT**

ORDRED: Roosevelt Water Conservation District's Petition for Interlocutory Review of Portions of Order of September 9, 1988:

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number [sic] 4 & 5; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 5; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioner Church of Jesus Christ of Latter Day Saints]:

Review is granted and denied to the same extent that the petitions of City of Glendale, Roosevelt Water Conservation District, Arizona Public Service Company, Magma Copper Company, Farmers Investment Company, Cyprus Minerals Company, Apache Powder Company, City of Phoenix, Salt River Project Agricultural Improvement and Power District and the Salt River Valley Users' Association are granted and denied.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation & Drainage District and New Magma Irrigation & Drainage District]:

Review is granted and denied to the same extent as the petitions of Arizona Public Service Co., Magma Copper Co., Farmers Investment Co., Roosevelt Water Conservation District and the City of Glendale are granted and denied.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Gila Valley Irrigation District and Franklin Irrigation District]:

With respect to the issues in which it expressed "particular interest":

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is denied.

WC-90-0006-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. CITIES OF MESA, TEMPE, CHANDLER, AVONDALE AND CASA GRANDE**

ORDERED: Petition for Interlocutory Review [Petitioner Cities of Mesa, Tempe, Chandler, Avondale & Casa Grande]:

Issue Number 1 = Review is denied;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 6; review is denied in all other respects.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; Review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Gila Valley Irrigation District and Franklin Irrigation District]:

With respect to the issues in which it expressed "particular interest":

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is denied.

WC-90-0007-IR **IN THE MATTER OF THE RIGHTS TO THE USE OF THE GILA RIVER vs. CITY OF GLENDALE**

ORDERED: City of Glendale's Petition for Review by Interlocutory Appeal of the Trial Court's September 9, 1988 Order [Petitioner City of Glendale]:

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 4; review is denied in all other respects;

Issue Number 2 = Review is denied;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioner Church of Jesus Christ of Latter Day Saints]:

Review is granted and denied to the same extent that the petitions of City of Glendale, Roosevelt Water Conservation District, Arizona Public Service Company, Magma Copper Company, Farmers Investment Company, Cyprus Minerals Company, Apache Powder Company, City of Phoenix, Salt River Project Agricultural Improvement and Power District and the Salt River Valley Users' Association are granted and denied.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Central Arizona Irrigation and Drainage District, Maricopa-Stanfield Irrigation & Drainage District and New Magma Irrigation & Drainage District]:

Review is granted and denied to the same extent as the petitions of Arizona Public Service Co., Magma Copper Co., Farmers Investment Co., Roosevelt Water Conservation District and the City of Glendale are granted and denied.

FURTHER ORDERED: Cross-Petition of United States for Interlocutory Review [Cross-Petitioner Department of Justice]:

Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects.

FURTHER ORDERED: Petition for Interlocutory Review [Joinder] [Petitioners Gila Valley Irrigation District and Franklin Irrigation District]:

With respect to the issues in which it expressed "particular interest":

Issue Number 1 = Review is granted to the extent it addresses the Court's Issue Number 2; review is denied in all other respects;

Issue Number 2 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 3 = Review is granted to the extent it addresses the Court's Issue Number 3; review is denied in all other respects;

Issue Number 4 = Review is denied.

DATED this 11th day of December, 1990.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN,
VICE CHIEF JUSTICE

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	Action No. WC-1, WC-2, WC-3 and WC-4 (consolidated) Maricopa County Superior Court Nos. W-1, W-2, W-3 and W-4 (consolidated) SPECIAL PROCEDURAL ORDER PROVIDING FOR INTERLOCUTORY APPEALS AND CERTIFICATIONS

Pursuant to Article 6, § 5 of the Arizona Constitution, A.R.S. §§ 45-259 and 12-2101, and Rule 19(a)(3) and (f), Arizona Rules of Civil Appellate Procedure, 17B A.R.S., the following procedure is adopted for interlocutory appeals and certifications arising from this general adjudication:

A. Scope

Any party to this general adjudication of water rights under A.R.S. § 45-251 *et seq.* may petition the Supreme Court to review by interlocutory appeal any ruling of the superior court. Also, the trial court may certify to the Supreme Court questions deemed substantial and properly the subject of interlocutory review or appeal under this rule.

B. Grounds

The decision whether to grant or deny a petition for interlocutory review or appeal or certification shall be discretionary. In the exercise of its discretion the Supreme Court may consider, without limitation, the following factors:

1. That the ruling of the superior court is in conflict with a ruling from another adjudication proceeding pursuant to A.R.S. § 45-251 *et seq.*;

2. That the ruling has decided an important question of law that should be decided by the Supreme Court before further proceedings or final judgment in the trial court;

3. That substantial savings of time, expense, or resources may be achieved through early appellate review;

4. That the interests of justice otherwise require early appellate review;

5. Those factors described in Rule 23(c)(4), Ariz.R.Civ.App.P., 17B A.R.S., or Rule 3, Ariz.R.P.Spec.Act., 17B A.R.S.

C. Time for Filing of Petition; Cross-Petition

A petition or certification seeking interlocutory review or appeal of a trial court ruling made prior to the effective date of this order shall be filed within one hundred fifty days after the effective date of this order. A petition or certification seeking interlocutory review or appeal of a trial court ruling made after the effective date

of this order shall be filed within ninety days after the trial court's ruling. For purposes of this rule, the date of the trial court's ruling shall be the date on which the last motion for reconsideration or request for amendment and/or alteration, however denominated, is finally resolved, providing such motion is filed within thirty days after the date the trial court first ruled on the question. A cross-petition for an interlocutory appeal may be filed within thirty days after service of a petition or certification.

D. Form and contents of petition, cross-petition or certification

To the extent possible, the petition, cross-petition or certification seeking interlocutory review or appeal shall comply in form and content with Rule 23(c), Ariz.R.Civ.App.P., 17B A.R.S. In addition, the petition or cross-petition shall contain a concise statement showing why the questions are ripe for interlocutory appeal.

E. Service

The petition, cross-petition or certification shall be served in the same manner as the superior court pleadings in this general adjudication, as follows:

1. A copy of the petition, cross-petition or certification shall be mailed to all parties listed on the trial court's approved mailing list pursuant to Pre-Trial Order No. 1. A copy of the current approved mailing list shall accompany the petition. In addition, a copy of the petition, cross-petition or certification shall be filed in this

general adjudication proceeding. A copy of the petition, cross-petition or certification shall be served on the judge or master who made the ruling in question and on the Arizona Department of Water Resources.

2. The Arizona Department of Water Resources shall promptly serve a copy of the petition, cross-petition or certification on the judge or master and clerk of any other superior court in which a general adjudication is pending, who shall then give appropriate notice of the pendency of such petition to the parties to that adjudication.

F. Response

Within forty-five (45) days after service of a petition, cross-petition or certification, any party to the trial court proceeding may file a response, which shall comply in form and content with section (D) of this order and be served in the same manner as the petition, cross-petition or certification. Parties to other pending general adjudication [sic] desiring to participate in an interlocutory appeal shall file a motion for leave to intervene within forty-five (45) days after service of the petition pursuant to subsection (E)(2).

G. Reply

Any party to the proceeding below may reply to any response within thirty (30) days after service thereof. A reply shall be served in the same manner as a petition.

H. Order on petition; service

1. This court may issue its order on the petition, cross-petition, or certification without oral argument. The order shall grant or deny review by interlocutory appeal and specifically list those questions, if any, granted. An order denying a petition or certification or any part thereof shall not have any precedential value.

2. The order granting or denying interlocutory appeal shall be served by the Clerk of the Supreme Court on the trial judge, the master, the petitioner, the cross-petitioner, if any, and all persons listed on the service list accompanying the petition, and shall be filed of record by the Clerk of the Superior Court.

3. An order granting review by interlocutory appeal shall also schedule a pre-submittal conference not sooner than sixty (60) days after the service of the order, as provided below.

4. The Supreme Court may, on its own motion or on motion of the parties, consolidate one or more petitions, cross-petitions, or certifications from the same or different general adjudication proceedings for any or all purposes.

I. Pre-submittal conference

No later than twenty (20) days prior to the scheduled presubmittal conference, each party desiring to participate in the interlocutory appeal shall file a notice of appearance in the Supreme Court. The trial court shall not be deemed a party to the appeal, nor shall it participate in the appeal in any respect, even if the appeal is

based on its certification. The Supreme Court may designate the parties as appropriate and, in the case of a certification, may align the parties in accord with their true interest in the questions presented. At the presubmittal conference, the Supreme Court shall make orders regarding further briefing and oral argument, if any. It shall also determine what portion of the record will be required to be transmitted, the date of transmittal, the parties to join in the presentation of issues, and other appropriate matters.

J. Standard of review

The standard of review to be applied to any interlocutory appeal under this rule shall be the same standard that would apply had the review been made following a final judgment in the adjudication proceeding.

K. Costs and attorneys' fees

Unless provided by statute, there shall be no application for costs or attorneys' fees made to the Supreme Court in connection with a petition for review by interlocutory appeal or with an interlocutory appeal granted under this rule. However, Rule 25, Ariz.R.Civ.App.P., 17B A.R.S., is fully applicable to pleadings filed pursuant to this order. All other issues of costs and attorneys' fees, if any, shall abide the final resolution of the adjudication.

L. Other procedures

1. Except as otherwise provided herein, the Arizona Rules of Civil Appellate Procedure shall apply to proceedings under this order. Insofar as may be necessary, the provisions of Rule 5, Ariz.R.P.Spec.Act., 17B A.R.S., concerning stays, *ex parte* orders, restraining orders, and injunctions shall also apply.

2. This order is the exclusive remedy for the presentation of interlocutory issues to this court in this adjudication, including those issues that otherwise might be presented pursuant to the Rules of Procedure for Special Actions.

M. Priority

Insofar as possible, matters in this general adjudication shall be determined in preference to other civil matters.

N. Filing date and extension of time periods

All pleadings in any proceeding under this order shall be deemed filed on the day of mailing if deposited in a United States Post Office or mailbox, addressed to the Clerk of the Supreme Court, within the time allowed for filing. The Court, on its own motion, or by motion of a party with good cause shown, may grant extensions of any of the time limits set out in this order.

COMMENTS

Purpose. The purpose of this order is to establish a procedure for early review of all substantial questions in this general adjudication of water rights. Early appellate review may avoid wasteful trial court proceedings, may result in substantial savings of time or expense, or may for other reasons be in the interests of justice. The rule is not intended to be used for interlocutory appeal of individualized matters except where such an appeal might result in a ruling of general application that would advance the adjudication process.

Need. Existing procedure allows interlocutory considerations of trial court rulings in certain limited circumstances. Thus, A.R.S. § 12-2101 describes the appellate jurisdiction of the Arizona Court of Appeals with respect to final judgments and certain interlocutory orders. Rule 54, Ariz.R.Civ.P., 16 A.R.S., provides a certification procedure for making certain judgments final that would not otherwise be appealable. The Rules of Procedure for Special Actions permit discretionary review of interlocutory decisions where the decision is arbitrary, capricious, or an abuse of discretion, or where the trial court may be proceeding without, or in excess of, jurisdiction. None of these procedures, however, provides for discretionary appellate jurisdiction of the Supreme Court other than in these limited circumstances.

A general adjudication of water rights filed pursuant to A.R.S. § 45-251 *et seq.* is a lengthy proceeding that requires investment of vast public and private resources. There is a need to provide for discretionary appellate review of interlocutory decisions of the trial court in this

proceeding to avoid the waste that might otherwise occur if significant interlocutory decisions were only reviewable after final judgment, which might not be entered for several years.

Jurisdiction and authority. Article 6, § 5 of the Arizona Constitution provides that the Supreme Court shall have:

> 3. Appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax impost, assessment, toll, statute or municipal ordinance.
>
> * * *
>
> 5. Power to make rules relative to all procedural matters in any court.

Rule 19, Arizona Rules of Civil Appellate Procedure, 17B A.R.S., authorizes the Supreme Court to transfer appeals from the Appeals Court on its own motion. The adoption of this special procedural order will effectively transfer all interlocutory appeals under this order to the Supreme Court pursuant to Rule 19(f).

Service. Subsection (D) of the order provides for service of the petition on parties to the adjudication in the same manner as other pleadings are served. In addition, filing the pleading of record in the superior court proceedings will cause the petition to be listed in the clerk's docket summary, which is mailed monthly to subscribers and which is available in the clerk's office for review by any party.

Response/cross-petition. The response provides a party with the opportunity to support the petition or set

forth the reasons why the petitions should not be granted. The response may also seek to narrow the scope of the interlocutory appeal if granted or to reformulate the matter for which interlocutory appeal is sought. The cross-petition may seek to have the court grant an interlocutory appeal of additional related questions if the petition or certification is granted. The cross-petition should make the same showing as required for the petition itself.

Order denying petition. Unless stated to the contrary, an order denying a petition, cross-petition or certification is not intended to indicate that the Supreme Court approves of the trial court's ruling, but only that the Supreme Court has determined that there is an insufficient basis on which to grant review by interlocutory appeal. A subsequent petition, cross-petition or certification seeking interlocutory review or appeal of a ruling for which a previous petition has been denied may be entertained by the court, but only on a showing of a change of circumstances or additional grounds which could not, in the exercise of reasonable diligence, have been known at the time of the previous petition, cross-petition or certification.

Stay. The granting of a petition for an interlocutory appeal shall not stay the proceedings in the superior court unless expressly so ordered by the Supreme Court.

Dated this 26th day of September, 1989.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN,
VICE CHIEF JUSTICE

[Mailing List Omitted]

APPENDIX D

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

IN THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) ORDER

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Introduction

On May 20, 1988 this Court heard argument on the motion of various city claimants to exclude from the adjudication all wells which are pumping "percolating groundwater" and to include in this adjudication only "surface flow" and "sub surface flow" as defined by *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton*, 39 Ariz. 65, 4 P.2d 369 (1931). That motion, filed November 17, 1987, was the result of many discussions herein relating to the relationship between surface water and ground water and how these different sources of water interface and affect each other. This has been an on-going matter of consequence and it resulted, after request of counsel, in five days of hearings on the general subject. From October 19, to 23, of 1987, the court heard the testimony of a number of leading hydrologists and hydrological engineers, including Leonard Halpenny, Thomas M. Stetson, Catherine Kroeger Rovey, William Gookin and William Guyton, as well as others also well qualified. They testified as to groundwater and surface water relationships. Each filed voluminous reports which were received in evidence. These covered the general relationship of ground and surface water and specifically

its relationship in the San Pedro and Santa Cruz watersheds.

Because the issue covered by that five day hearing and the cities [sic] motion fell within the purview of the issues which the court believed were appropriate for determination under section 10 "Issue Identification and Resolution" of Pre-Trial Order No. 1 dated May 29, 1986, this Court, with counsels [sic] concurrence, decided to use the cities' motion as a vehicle to identify and resolve a number of important and sensitive surface water and ground water issues. The matter was discussed at our 11/20/87 hearing in the following terms.

> A discussion is opened by the Court on the decision which the court must make on the Ground water [sic] and Surface Water "Interrelationship" which was the subject of the October 19th to 23rd, 1987 hearing. The Court then brought up the motion filed by numerous cities to exclude ground water from this adjudication. The Court advises it believes it appropriate to expand the cities' motion to the entire issue of the Ground Water and Surface Water Relationship, including whether or not the "Winters Doctrine" applies to ground water. It is agreed that all parties may submit a list of what issues should be included in the determination to be made, provided that no list shall exceed ten pages. The list shall also be submitted no later than 5:00 p.m. on December 8, 1987.
>
> The Court will take up the scope of issues to be considered at its December 17, 1987 hearing. Upon its determination of the issues to be considered, all parties shall have 60 days to brief the same and 30 days thereafter to respond to

> the others' briefs submitted. D.W.R. is specifically ordered to brief the issues ordered and respond, particularly with regards to the matters of what legal authority this Court has in this jurisdiction to act, in what ways different decisions would impact D.W.R.'s ability to provide accurate and correct information and effects upon administration of any decree arrived upon, as well as what other issues D.W.R. as this Court's technical and administrative adviser D.W.R. believes must be considered for his adjudicative process to be meaningful. Minute Entry Order 11/20/87, page 4.

On 12/17/87 the court and counsel discussed the submissions filed and the Court advised it would then decide what those issues would be. On 1/19/88 this Court issued the following orders.

> Pursuant to this Court's order at its November 20, 1987 hearing and the hearing on December 17, 1987, this Court has received the filed lists of issues which a number of parties submitted which they believe should be included in the question of the Ground Water and Surface Water relationship, all as raised by the Motion for Summary Judgment filed by a number of cities to exclude ground water from this adjudication. The Court has also considered the comments made by counsel at our hearing on December 17, 1987. As the Court said then, it has found in many of the lists submitted similar issues raised and in some there was submitted question [sic] of such complexity that a substantial factual hearing would be needed to provide a data base from which to start answering such questions. Such submitted issues have been discarded.

However, after attempting to distill all submissions to issues which can be decided as matters of law and after considering the evidence taken at our hearing on the issue from October 19 to the 23rd, 1987, the Court finds that in addition to the issues raised in the cities' motion, the Court will consider the following issues which it believes are related to the ground water relationship issues of this case.

1. Is ground water included within the phrase "river system and source" as it is used in A.R.S. §§ 45-141 and 45-251(B), and if so, to what extent is it included?

2. Is ground water included within the phrase "water subject to claims based on federal law" as it is used in A.R.S. § 45-251?

3. Assuming that percolating ground water is not included in the definitions of A.R.S. § 45-141 and 45-251(B), does a McCarran Amendment Adjudication require that percolating ground water be included and if so, how can this be done under Arizona law?

4. If the answer to Issue No. 3 is in the affirmative, does the adjudication have to include only claims under federal law or must state law claims as to percolating ground water also have to be included?

5. If the answer to Issue No. 3 is in the affirmative, does the adjudicatory process extend to a determination of rights to percolating ground water which is normally in this state subject to a "reasonable use" standard to the same extent as it does to surface water which normally is subject to "prior appropriation" standard?

6. Does the "Winters" Doctrine of Federal Reserved Rights apply to percolating ground water under and/or outside of a federal reservation, how does it apply and does it apply only to the reduction of surface water resources and/or ground water resources beneath the federal reservation?

7. If percolating ground water in the watershed of the Gila River System is subject to the jurisdiction of this adjudication, what is the affect of the Ground Water Management Act of 1980?

8. Are there technical and/or procedural problems in determining, prioritizing and/or apportioning ground water rights which present problems of such magnitude in the reliability of the data for such a determination that an attempt to prioritize ground water could violate due process requirements? Minute Entry Order dated 1/19/88.

Between 1/29/88 and 5/20/88 this Court received several hundred pages of briefs from many claimants consisting of responses to the cities' 41 page motion, replies to those responses, and finally a reply of the cities to all those responses and replies. In the meantime the Court did have the benefit of a very substantial soon to be published law review article by Professor of Law John D. Leshy of Arizona State University entitled "Arizona Law Where Ground and Surface Water Meet."

It is the issues above delineated and the issues of the cities' motion which were briefed, argued and which this court will attempt to deal with in this order.

Is the Process of Issue Identification and Resolution Followed Here and Throughout This Case Appropriate

As is readily apparent from a reading of the prior section of this order the process being followed here of early issue identification and resolution is neither a traditional nor ordinary method of resolution of legal issues in litigation. This fact has been brought to the court's attention on several occasions by claimants who suggest such issue resolution should await the evidentiary hearings in each watershed. They argue only after all facts are known should such decisions be made. Unfortunately, this adjudication is not traditional litigation or even a traditional complex litigation of multiple parties. Even in that type of case, with many parties, there are generally two, three, four or five sides and the parties line up behind one or another of the sides. In this case there are thousands of claimants, all of whose claims relate to and opposes [sic] all other claims. There is a finite amount of water available. Each claimant's right takes from the possible rights, amount and/or priority of every other claimant. While it is apparent that many of the claimants are in alliance on certain issues, in fact each claimant is adverse to every other claimant no matter whether their property lies in the upper reaches of the Salt or the lower reaches of the Gila.

Making this even more complicated is the fact that the adjudication process of A.R.S. §§ 45-251 to 45-260 provides each claimant shall file a complicated Statement of Claimant and there after [sic] the Department of Water Resources (D.W.R.) shall issue a certain Hydrographic Survey Report (H.S.R.) for each watershed. These reports are the foundational basis from which the master will

determine his report of the rights and priority of the various claimants. Each claimant has a right to object to those reports, and an opportunity to present evidence to support his individual claim, (see A.R.S. §§ 45-254, 256 and 257) but D.W.R.'s H.S.R. is still the foundation of the process. Finally this process has been approved by the Arizona Supreme Court in *U.S. v. Superior Court*, 144 Ariz. 265, 697 P.2d 658 (1985).

For the Department of Water Resources, this has been a long, on-going, expensive and labor intensive process. It requires a high degree of cooperation and advice from the Court as to what it should investigate, how it should report, and what it is that it should be dealing with. The budget for this process exceeds a million dollars per year and it is essential that if this money is to be wisely spent and not wasted, many of these issues need to be resolved before the report is made. In many instances DWR needs instruction as to how they should investigate and report. Often D.W.R.'s questions are the very ones considered in this issue identification and resolution process. If this is not done first, D.W.R. and its personnel will waste money, manpower and effort on matters which will be meaningless, issues will have to be restudied, but most of all the process significantly delayed because the report focused on the wrong issues, facts or rights.

Delay may be of benefit to some claimants, particularly those who already have and are using the water. For those who claim "reserved rights" and do not presently have actual use of the water, unnecessary delay is an unconscionable additional burden.

It is evident this adjudication will be a long process, but it need not be made longer simply to satisfy the ordinary and traditional method of "one on one" litigation. This case is very unique. A.R.S. §§ 45-251 et. [sic] seq. Our Supreme Court recognized this is in *U.S. v. Superior Court, supra.* It also recognized its uniqueness in its latest order of March 3, 1988 which says:

> Further construing the terms of Rule 53(a), the Court does not believe it necessary that every factual issue in this case be decided in a traditional courtroom proceeding. Much of the factual evidence in this case may well be gleaned from documents, historical records, archaeological data and the like. The parameters of the trial judge's evidentiary discretion in this case are considerable.

Finally the court points out that what it has done here is consistent with the process outlined in its Pre-Trial Order #1, article 10.

For all of those reasons this Court overrules any objections to the process being followed.

Is the Jurisdiction of this Case Determined by the McCarran Amendment or by Arizona Statutes

An appropriate place to start the discussion of the issues here involved is whether the jurisdiction of this case is determined by the McCarran Amendment, 43 U.S.C. [sic] 666, or by Arizona statutes A.R.S. §§ 45-141 and 45-251(B). To a large extent this issue is a microcosm of the larger issue to be determined here. On one hand

the federal claimants and Indian tribes claim the adjudication must include all water, surface and ground, which is hydrologically connected, no matter how slight the connection to meet some test of "Comprehensiveness" which they claim a "McCarran Act" adjudication requires. On the other hand, many if not all of the state right claimants want the adjudication limited to surface water appropriable under A.R.S. § 45-141 (surface and sub surface flow) and "water rights subject to claim based on federal law" under A.R.S. § 45-251, which they define as reserved rights derived from *Winters v. United States*, 207 U.S. 564, 28 S. Ct [sic] 207, 52 L. Ed. 340 (1908). The extent of this conflict is probably best illustrated by the claim of the United States that this Court must prioritize and apportion all ground water rights in the state, whether related to a federal reserved water right or not. This they claim in spite of the long held Arizona rule that ground water is not "appropriable" and such "appropriability" sets the limits of this adjudication's jurisdiction as to state right claimants under A.R.S. § 45-141.

Fortunately for this case, the argument has no merit.

1. The McCarran act [sic] is an act of procedural context which waives the sovereign immunity of the United States, its agencies and those Indian tribes which are subject to trust status.

2. The McCarran Act does not confer or define the jurisdiction of the adjudicating court and confers no substantive rights on the adjudicating court or change the water law of the state in which the adjudication occurs.

3. Each state can define its own process for the adjudication as long as it meets the McCarran Act

guidelines. If that process meets those guidelines then the waiver of sovereign immunity applies.

4. The jurisdiction of this court for this adjudication is provided by A.R.S. §§ 45-141 and 45-251. It consists of that "river system and source" which is appropriable under A.R.S. § 45-141 and "all water subject to claims based upon federal law." A.R.S. § 45-251.4.

It is clear that percolating ground water in this state is not subject to appropriation. *M.C.M.W.D. No. 1 v. S. W. Cotton*, supra and *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953). There is not a "comprehensiveness" requirement in the McCarran Act that makes it otherwise. Not one of the cases cited by the United States in its memoranda for that "proposition" supports their theory. Most clearly conflict with it. Those cases are *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed2d [sic] 15 (1963); *United States v. District Court*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971); *Colorado River Water Conservation District v. United States* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 97 L.Ed.2d 1018 (1978); *United States v. Bluewater Toltec Irrigation District*, 580 F. Supp [sic] 1434, 1446 (1984); and *Matter of Determination of Conflicting Rights*, 484 F. Supp [sic] 778, 783, 784 (D.Ariz. 1980). Each one of these cases flies in the face of the comprehensiveness theory that the United States suggests. In each one of them there was a significant degree of non-comprehensiveness. There is not a single case which supports the comprehensiveness theory the United States claim [sic]. This theory is an unwarranted extension of an attempt to foster federal claims. Even in a recent case cited by the United States for its position, *Idaho ex rel Higginson v.*

Unites [sic] *States*, No. 39576 (Idaho District Ct., Twin Falls County, Oct. 14, 1987) the Department of Justice argued exactly the opposite. This was in the Snake River adjudication. While it is true Judge Hurlbutt ruled to include state groundwater users in the adjudication, it was because his statute, Idaho Code § 42-1406(A) (Supp 1987) specifically made "all users of surface and ground water" on the Snake river [sic] system subject to the adjudication. A.R.S. §§ 45-141 and 253 are to the contrary. They retain Arizona's long held concept that it is only appropriable water (surface and subsurface flow) which is subject to the adjudication where the right claimed is under state rights.

Based on all of the above this court finds its jurisdiction is limited by and defined by A.R.S. §§ 45-141 and 45-251 and is neither enlarged by or restricted by 43 U.S.C. [sic] 666.

Agreements by Counsel as to What Should Be Included Which May Not be Clearly Within Parameters of A.R.S. §§ 45-141 and 45-251

The cities' motion of 11/17/87 started out claiming that all wells pumping "percolating ground water" should be excluded from the case. However, by the time of the argument on 5/20/87 every one [sic] through the evolutionary process of briefing and argument had come to agree with the position of Thomas M. Stetson who on 10/20/87 in describing a similar adjudication in the San Gabriel River Watershed of California recommended that all wells be included and cataloged at least for location, date of drilling, first use, historical data, and amount of

water even if the jurisdictional limits of the case did not require a determination of their priority and entitlement. Inclusion in the judgment of the data base of all the wells for those purposes appears to be commonly agreed upon and accepted by many who argued on 5/20/88. It was opposed by none. The Department of Water Resources will be so ordered to include the same in its reports and they will be so recognized in any judgment arrived at, even if their source does not fall in the area of water which is appropriable or subject to federal claims.

Secondly, the proponent of the cities' motion and several other counsel agreed in argument that because of the cases *M.C.W.C.D No. 1 v. Southwest Cotton*, supra and *Pima Farms v. Proctor*, 30 Ariz. 96, 245 P. 369 (1926), the court must include in appropriable water not only the surface flow of a stream but also the sub-surface flow which supports and is connected to the surface flow. This is so even though the *Southwest Cotton* case defines this sub-flow in a more limited fashion than the *Pima Farms* case, using the following terms.

> The best test which can be applied to determine whether underground waters are as a matter of fact and law part of the surface stream is that there cannot be any abstracting of the water of the underflow without abstracting, a corresponding amount from the surface stream,
>
> * * *
>
> Does drawing of the subsurface water tend to diminish appreciably and directly the flow of the surface stream?
>
> (39 Ariz. at 96 and 97)

Still, where to factually draw the line on the ground remains a significant problem. The point most counsel accept, though some go further, is the suggestion of hydrologist Leonard Halpenny, that at least those wells which withdraw water from the "younger alluvium" of the tributary streams' basin should be presumed to be pumping sub-flow. The Court will accept that and will instruct D.W.R. in its reports to investigate such and treat such wells as pumping appropriable stream flow provided that the investigation shows:

1. As to wells located in or close to that younger alluvium, the volume of stream depletion would reach 50% or more of the total volume pumped during one growing season for agricultural wells or during a typical cycle of pumpage for industrial, municipal, mining, or other uses, assuming in all instances and for all types of use that the period of withdrawal is equivalent to 90 days of continuous pumping for purposes of technical calculation.

2. A well is designated on state records as an in lieu well [sic]

3. A well is designated by state certification as pumping surface flow, such as the wells for Pima Farms.

While it may appear the above instructions are somewhat arbitrary, they are basically for use in instructing D.W.R. in the preparation of its H.S.R. It certainly shall not preclude any owner of such a well, at the time of the evidentiary hearing, from coming in and showing that the well is not pumping sub-flow, regardless of the location of the source of that well.

The Limits of Jurisdiction as to the Adjudication of Those Claims of Water Rights Under State Law

By this point, it should be obvious that the limits of jurisdiction of this adjudication are the limits of the two types of claims to be included. These are the claims of those being made under a state right appropriation and under reserved rights which are derived because the land is federally owned or federally intrusted. In this section of the order the Court will discuss the state right appropriations.

Under A.R.S. § 45-252 any water user of a river system or source may petition for an adjudication of "the nature, extent and relative priority of the water rights of all persons in the river system and source." It is the definition of what the "river system and source" is which sets the limits or jurisdiction of this adjudication. In A.R.S. § 45-251.4 the first category is "all water appropriable under § 45-141." A.R.S. § 45-141.A reads as follows.

> A. The water of all sources flowing in streams [sic] canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

Therefore, the first and largest category of sources of water supply subject to this adjudication, and necessarily the largest is the segment of the water supply already appropriated and in use, surface flow. This includes by way of illustration the surface flow of the Salt, Verde, Gila, Agua Fria, Black, and other rivers or streams.

Second, we have the sub-flows of these rivers as such sub flow [sic] is defined by the *Southwest Cotton* case and those which follow it. No matter what one may suggest about the present day technical accuracy of Justice Lockwood's 1931 decision in *Southwest Cotton*, it has been the law in this state for more than 50 years and accurately reflects what the law was for the fifty years prior to its decision.

Having decided that under claims based on state law this court has jurisdiction only to determine the "nature, extent, and relative priority" of surface and sub surface flow, the Court believes it should also define what it may not consider under state law, because later on it must consider whether that rule remains the same for claims under federal law.

As of the Gadsen [sic] Purchase in 1853, water rights in this state were as set forth on page 75 of 39 Ariz. Reports in the [sic] *Southwest Cotton*. By case and statute, Arizona long ago decided that only surface water and stream flow are appropriable. As to percolating groundwater, there was no right of appropriation. Since territorial days, Arizona law has been that a user of percolating ground water had a right to remove such water anytime for any reasonable use as long as it was put to that use on the land from which it was withdrawn. This was permissible without reference to its effect on his neighbor's static water level, effect on his neighbor's ability to withdraw groundwater from his well or it's [sic] effect on his neighbor's upstream or downstream surface flow level, *Bristor v. Cheatham, supra, England v. Ally Ong Hing*, 8 Ariz. App. 374, 446 P.2d 480, [sic] (1968) 8 Ariz. App. 558, 448 P.2d 128 (1969); *Bull v. Siegrist*, 169 Or. 180, 126 P.2d 832 (1942); *Jarvis v. State Land Department*, 104

Ariz. 527, 456 6 [sic] P.2d 385 (1969); 106 Ariz [sic] 506, 479 P.2d 169 (1970); 113 Ariz [sic] 230, 550 P.2d 227 (1976); *Farmers Investment Co. v. Bettwey*, 113 Ariz [sic] 520, 558 P.2d 14 (1976). Except for the provisions of the Groundwater Management Act, A.R.S. §§ 45-401 through 45-655, that is still the law in this state today.

A *caveat* needs to be inserted here, for the Groundwater Management Act has created significant changes in the right to withdraw and use such groundwater in those areas designated by the law as Active Management Areas (A.M.A.s) and Irrigation Nonexpansion Areas (I.N.A.s). Those changes need not be gone into here except to state that in those areas the right to basically withdraw and use percolating groundwater has gone from what could formerly be annalogized [sic] to a limited form of "riparian" right to a much more restricted "appropriative" right. Finally it should be noted that the enactment of that act also has the effect to cause our Supreme Court to recognize in *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), appeal dismissed 457, [sic] U.S. 1101 (1982), rehearing denied 459 U.S. 899 (1982), that the owner of the overlying surface had no *right* to withdraw the water beneath his lands for reasonable use until that right came into being by the actual withdrawal and then, and only then, that right was only for the limited purpose of using the water.

> We therefore hold that there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that right of the owner of the overlying land is simply to the usufruct of the water.
>
> (131 Ariz. at 82)

Further the Arizona Supreme Court recognized that the right to make such a withdrawal was subject to legislative control, to wit: the Groundwater Management Act. See also *Cherry v. Steiner*, 543 F.Supp. 1270 (D. A. 1982).

Having said all of the above, a further *caveat* needs be inserted as it will lead to the next section of this order, to wit: a discussion of claims based on federal law or federal reserved water rights. Arizona by its statutes, constitution and case law from 1865 on, had an ability to affect only those water rights derived under Arizona law. It could not by enactments such as the Groundwater Management Act or its long line of decisions on the subject or otherwise affect the reserved water rights to surface water or groundwater of federally owned or federally entrusted lands such as Indian reservations.

Claims under [sic] Federal Law or What Reserved Rights Do Federal Lands or Federal Entrusted Land Have When There Has Been, as of this Date, No Physical Appropriation or Use

There are basically three different kinds of federal lands involved in this case. *First*, there is federally owned land as to which there is no federal statutory purpose or dedication to its use. As to such non-dedicated land, it has no greater rights to water use than any other neighboring private or state owned lands. There is no federal reserved right which attaches. There really is no issue in this case as to these lands.

Second, there are those federal lands which have a dedicated statutory purpose, such as national forests, parks, monuments, air fields, military establishments, etc.

All of these have federal reserved rights, whether in actual use or not, whose priority goes back to the date of the statutory enactment of the properties [sic] purpose. *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed2d. [sic] 1052 (1978).

Third, there are the federally entrusted lands, basically Indian reservations which also have federal reserved rights, whether in actual use or not, whose priority goes back to the date of the establishment of the reservation either by treaty, statutory enactment, or executive order.

While the above is a minimum picture of the rights involved, it is significantly more complicated and to a large extent somewhat undecided by the federal courts whose decisions bear on the subject. In the most recent decision on point, *In re Water of Hallet Creek Stream System*, 749 P.2d 324 (Cal. 1988) the Supreme Court of California indicated all federal lands start off with exactly the same rights to water as their neighboring private lands, plus they have such additional federal rights as accrue to that land by reason of its dedicated federal purpose. Their reserved water right is determined by federal case law or federal statute, except where that statute or case law chooses to apply the law of the state where the land is located.

Under the case of *United States v. New Mexico, supra*, all dedicated federal land has reserved to it that minimum amount of water which is necessary to effectuate the primary purpose of the land set aside. As to all secondary purposes there is no reserved right to water

and the United States can acquire water for that secondary purpose only in the same manner as any other user in the state.

The rule is a little different for entrusted lands, Indian reservations. Starting with the case of *Winters v. United States,* supra in 1908 and continuing through *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) and *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382 [sic] 75 L.Ed.2d 318 (1983) the federal courts have continually held that each Indian reservation has reserved to it such water as is necessary to effectuate the purpose of that reservation. While as to other types of federal lands courts have allowed controversy about what the purpose of the land is and how much water will satisfy that purpose, as to Indian reservations the courts have drawn a clear and distinct line. It is that the amount is measured by the amount of water necessary to irrigate all of the *practicably irrigable acreage* (P.I.A.) on that reservation. In the opinion of this Court, the United States Supreme Court has drawn such a clear and distinct line for Indian reservations for fear that in cases such as this, they could be drawn into a potential racial controversy where some water user claims the reservations [sic] purpose was that of a "prisoner of war" camp where the "cavalry" intended to secure "wild marauders" from the surrounding "peaceful settlers", and how much water does a P.O.W. camp need?

In every decided case which has dealt with the subject, the amount of available water on or near the reservation was close to or enough to satisfy all the needs of the reservation and surrounding lands. That is not true in our desert environment.

While there is no case saying so, rationality must require another limiting factor in cases such as ours. With regard to federal reserved right claimants, including Indian reservations in limited water or desert environments, there must be the limiting factor of the amount of water from all sources available on or near the reservation on or about the date of the dedication of the land's purpose. The water to satisfy the federal purpose or practicably irrigable acreage cannot exceed that amount.

A major issue of nearly every brief filed for this hearing and the cities' motion, with the exception of the federal and Indian claimants, was the argument that if there was a federal reserved right to water, that right was limited only to "surface water". The claim is that there is no federal reserved right to ground water. In support of this proposition, every claimant except the federal and Indian claimants cite *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1978)[.] On the other side, every federal and Indian claimant cites the prior Ninth Circuit decision holding that there is a reserved right to ground water. While that decision was vacated, its result was affirmed. See 508 Fed [sic] 313 (1974). Interestingly, on this issue the Supreme Court decision has some very note worthy [sic] things to say.

> The implied-reservation-of-water-rights-doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.
>
> * * *
>
> No cases of this court have applied the doctrine of implied reservation of water rights to groundwater. Nevada argues that the implied

> reservation doctrine is limited to surface water. Here, however, the water in the pool is surface water. The federal water rights were being depleted because, as the evidence showed, the "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle."
>
> * * *
>
> Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.
>
> (426 U.S. at 141-143)

There are two ways one can interpret this decision, but both lead to the same conclusion. *First*, the implied reservation theory applies only to surface water, but since all surface water is interconnected to sources of groundwater, the right holder can prevent groundwater withdrawals that will decrease the amount of surface water available to fulfill the federally dedicated purpose. If you protect the groundwater pool to preserve the surface water flow, in effect you preserve the groundwater pool beneath the federal land available for withdrawal by federal right holders. *Second*, that the United States Supreme Court doesn't care where the water comes from, as long as sufficient sources remain to fulfill that property's purpose on a priority basis. Both theories work to preclude groundwater diversion which reduces water sources on the reservation, regardless of whether or not the diversion is on or off the reservation. In this Court's opinion, the second theory is more logical, reasonable

and in line with scientific theories of the integrated hydrologic cycle. This Court finds that federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. if the land is an Indian reservation.

Next, moving into an area in which there is no direct case or statutory authority in point, this Court believes that the doctrine enunciated in *United States v. New Mexico*, supra requires that the Court structure any judgment and its enforcement so that the impact of the use of federal reserved rights is minimized upon those whose state rights will be diminished and who had no "fault" in utilizing "water" which will now be used to fulfill Indian and federal reserved rights. In its power to mitigate loss and damages, a court has the power and should structure any judgment so that the actual taking and use of this federal reserved right is done in a manner which will minimize its effect on other users while still providing a source to meet the quantity needed. For example, a court, after taking evidence to provide a basis therefore, could apportion the federal reserved right between surface and groundwater in such a way that the quantity needed is fulfilled but the damage or loss to other users is minimized.

This is allowable because no decision has ever indicated that the source of the water is important, as long as the need is fulfilled. Also in support of this theory, it is worth noting the United States Supreme Court has also often stated that with regard to water law, to the extent

state water law can be followed without the diminishment of those rights which federal law seeks to protect, the federal court should allow state law to remain in effect.

While Arizona courts in *Southwest Cotton, supra,* and later cases have indicated that a surface water user has no right to sue or enjoin an upstream groundwater user whose reasonable use affects the flow of downstream groundwater, those rulings are not binding on the United States in its proprietary or trust capacity as to reserved surface water rights. Federal reserved surface water rights are subject to federal case law. That case law established in *Cappaert v. United States, supra* preserves federal surface water availability within such time frame as would affect the federal government's ability to carry out the primary purpose given the establishment of the federal reservation.

There is no question and the testimony in [sic] October, 1987 hearing clearly showed that to allow unlimited downstream groundwater pumping, even for a reasonable or beneficial use on the land above where the groundwater source is located, will and has significantly diminished the flow of many of Arizona's perennial and intermittent streams, including the Santa Cruz and the San Pedro Rivers. If this is allowed to continue, this can and will destroy or significantly diminish federal and tribal reserved rights to those streams where they have reserved surface flow rights.

To protect those reserved federal surface flow rights it is essential that downstream pumping which significantly diminishes those rights be located, prioritized and

the amount of diminishment established to provide a basis for later enforcement of whatever priority of reserved federal rights there is. The fact that under Arizona case law, surface flow appropriators have no right to protection against upstream groundwater pumpers does not diminish the right of holders of federal reserved surface water rights from protection against such diminishment under *Cappaert v. United States, supra.* This Court's jurisdiction under our adjudication statues [sic] and the "McCarran" Amendment extend to such rights, as they are rights under "federal law".

In the opinion of this Court, the same rationale applies to the rights of dedicated federal lands where the single or major source to supply water to meet that purpose or fulfill a P.I.A. requirement is groundwater. If that groundwater was available on the date of the establishment of the national forest, park, monument or reservation and it is now not reasonably available because others off the reservation have diminished the reservation's ground water resources by their pumping, there is no basis to apply any other rationale than that found in *Cappaert v. United States, supra.* Again, the court should structure any judgment or order to minimize damages and/or impact on innocent users.

Because each sub-watershed is to an extent different and the downstream location of federal and Indian reserved surface water rights is different as compared to where upstream ground water pumpers are located, it may be necessary to hold factual and evidentiary hearings to establish the parameters of what constitutes a significant diminishment of the water rights within such time frame as would affect the United States [sic] ability

to carry out the primary purpose of the reservation or federally reserved lands.

Conclusion

Based on all of the above the Court must conclude that the cities' motion to exclude all groundwater wells must be denied and it is so ordered. Dealing next with the specific issues of the 1/19/88 order the court answers them as follows.

1. Is groundwater included within the phrase "river system and source" as it is used in A.R.S. § [sic] 45-141 and 45-251(B) and if so. [sic] to what extent is it included?

Answer. Groundwater is included in the appropriable water only when it meets the criteria of "sub-surface flow" as defined above or when the water source is for a claim based on federal law.

2. Is groundwater included within the phrase "water subject to claims based upon federal law "as it is used in A.R.S. § 45-251?

Answer. Yes.

3. Assuming that percolating groundwater is not included in the definitions of A.R.S. §§ 45-141 and 45-251(B), does a McCarran Amendment Adjudication, require that percolating groundwater be included and if so, how can this be done under Arizona law?

Answer. No, the McCarran Amendment doesn't require it, but federal law requires its inclusion where the claim is based on federal reserved rights.

4. If the answer to Issue No. 3 is in the affirmative, does the adjudication have to include only claims under federal law or must state law claims as to percolating groundwater also have to be included?

Answer. No. However cataloging all such percolating groundwater claims will serve a significant purpose and should be done. It is not required.

5. If the answer to Issue No. 3 is in the affirmative, does the adjudicatory process extended to a determination of rights to percolating groundwater which is normally in this state subject to a "reasonable use" standard to the same extent as it does to surface water which normally is subject to "prior appropriation" standard?

Answer. No, where the use of groundwater affects only state rights. Yes, where the use of groundwater affects federal rights.

6. Does the "Winters" Doctrine of Federal Reserved Rights apply to percolating groundwater under and/or outside of a federal reservation, how does it apply and does it apply only to the reduction of surface water resources and/or groundwater resources beneath the federal reservation?

Answer. Yes. See above.

7. If percolating groundwater in the watershed of the Gila River System is subject to the jurisdiction of this adjudication, what is the affect of the Groundwater Management Act of 1980?

Answer. Technically there should be no effect as rights under the Groundwater Management Act are neither appropriative rights under A.R.S. § 45-141 or rights

claimed under federal law. Practically however, rights of groundwater users in A.M.A.s and I.N.A.S [sic] would have to be considered when and if a court decides how to satisfy federal reserved rights and how to apportion the same between surface water and groundwater.

8. Are there technical and/or procedural problems in determining, prioritizing and/or apportioning groundwater rights which present problems of such magnitude in the reliability of the data for such a determination that an attempt to prioritize ground water could violate due process requirements?

Answer. None sufficient to preclude the adjudication.

Having ruled on the legal issues before it from the motion and the eight questions before the court, the Court will now move to the area of its instruction to the Department of Water Resources for its Hydrographic Survey Reports.

First, these reports should include all claims of surface rights and claims where the water being used is subsurface flow under the criteria previously described. These rights are to be cataloged, prioritized and entitlements assigned thereto by indicating the nature, extent and relative priority thereto, all as required by A.R.S. § 45-256. All other groundwater sources, not involving federal claims, shall be cataloged and their data determined as previously indicated.

When dealing with a claim made under federal law, the same procedure should be followed for those claims where the federal claim is for a diversion and use which is in physical use at this time. Where the claim is for a

federal reserved right and there is no present physical use D.W.R. shall also:

a. determine all sources of water reasonably available to meet the claim presently [sic]

b. determine the limits and characteristics of availability on the date as to which priority is established [sic]

c. determine [sic] the entitlement on the basis of a reasonable assessment of the reservations [sic] P.I.A. or, if not an Indian reservation then the property's primary purpose.

d. In determining a prioritization of such claimed federal reserved right, it will be necessary to determine all stream users or diversions of either surface water or groundwater which significantly affect those sources reasonably available on, at or near the federal parcel which would be available to fulfill the determined entitlement.

e. To the extent possible, exclude each domestic and stock water well and irrigation well irrigating no more than 2 acres, where D.W.R. determines that such wells [sic] diversions have so little effect as to be significantly unmeasurable.

Previously, in the third section of this order, this court discussed the federal claim of what comprehensiveness a "McCarran" Act adjudication required and concluded that what the federal claimants argued for was beyond what the law required. However, all case law and legislative history on the "McCarran" amendment indicates a preference for adjudications in state court because they can be more "comprehensive". While federal courts

can and often handle such, most adjudications are in state court because of an ability to be more comprehensive. To that extent, a "McCarran" Act adjudication does require some degree of comprehensiveness. In the opinion of this court, this adjudication under the parameters above outlined will meet that test.

DATED this 9 day of Sept. 1988

/s/ Stanley Z. Goodfarb
Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CC04 33390 — Code
9/9/88 — Date

HON. STANLEY Z. GOODFARB
Judge/Commissioner/Pro Tem

E. Schneider
Deputy

NO. W-1, W-2, W-3, W-4

In Re the General Adjudication
of All Rights to the Water in the
Gila River System and Source

This Court's order with reference to the relationship of surface and groundwater covering the issues argued on May 20, 1988 was approved, settled and signed this date with copies sent to all attorneys on the approved mailing list herein.

The Court has received Motions to Intervene and Orders with reference of Mark J. and Colette Westervelt, Bruno and Jollyn A. Salamone, and Peggy M. Hitchcock. All of these Motions will be taken up at the Court's next meeting on Friday, September 30, 1988 at 1:30 p.m.

Further, the Court advises counsel that a program by the American Water Resources Section has been scheduled for Friday, October 28, 1988 at the Sheraton Pueblo Inn, Tucson, Arizona. The court has been invited to be a speaker thereto. The Court notes from a preliminary program send [sic] to it that a number of attorneys in this case are also scheduled to be speakers at this meeting. Therefore, rather than have our October meeting on Friday, October 28, the Court will schedule a meeting for

1:30 p.m. on Thursday, October 27, 1988 so that any and all counsel who represent the claimants or DWR may attend the Tuscon meeting on the adjudication of water rights.

Pursuant to stipulation, and good cause appearing.

IT IS ORDERED that Jennele M. Morris be allowed to withdraw as counsel of record for the Cities of Mesa, Chandler, Tempe, Goodyear, Casa Grande, Avondale and Prescott, and that James P. Watts, of the law firm of Bill Stephens & Associates, P.C., be substituted as counsel of record for those Cities.

IT IS FURTHER ORDERED that James P. Watts is appointed to the Steering Committee previously established in this proceeding pursuant to Paragraph 10 of Pre-trial Order No. 1, all in accordance with the Order signed by the Court on August 31, 1988.

APPENDIX E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

RC11-33390
Code

1-19-88
Date

JUDGE STANLEY Z. GOODFARB
Judge/Commissioner/Pro Tem

E. Jackson
Deputy

NO. W-1, W-2, W-3, W-4

General Adjudication

As indicated at our December 17, 1987 hearing, John S. Schaper indicated an intention to offer his resignation as chairman of this Court's steering committee. This has been done and reluctantly accepted by this Court. A copy of this Court's letter of acceptance and statement of its appreciation for his work dated January 6, 1988 is attached and made a permanent part of the record of this case.

A formal order substituting Norman J. Davis for Alicia F. Tocco as attorney for the St. John's Irrigation District is filed this date.

This Court has had submitted to it a draft of a proposed pretrial discovery order and a proposed identification system which has been prepared by this Court's steering committee. Copies have been submitted to all counsel. The Court will take up the approval or modification of the order at the meeting on Friday, February 26, 1988 at 1:30 p.m. Any comments by counsel regarding the

orders shall be filed by 5:00 p.m. on Wednesday, February 17, 1988.

Pursuant to this Court's order at its November 20, 1987 hearing and the hearing on December 17, 1987, this Court has received the filed lists of issues which a number of parties submitted which they believe should be included in the question of the Ground Water and Surface Water relationship, all as raised by the Motion for Summary Judgment filed by a number of cities to exclude ground water from this adjudication. The Court has also considered the comments made by counsel at our hearing on December 17, 1987. As the Court said then, it has found in many of the lists submitted similar issues raised and in some there was submitted question [sic] of such complexity that a substantial factual hearing would be needed to provide a data base from which to start answering such questions. Such submitted issues have been discarded.

However, after attempting to distill all submissions to issues which can be decided as matters of law and after considering the evidence taken at our hearing on the issue from October 19 to the 23rd, 1987, the Court finds that in addition to the issues raised in the cities' motion, the Court will consider the following issues which it believes are related to the ground water relationship issues of this case.

1. Is ground water included within the phrase "river system and source" as it is used in A.R.S. § 45-141 and 45-251(B), and if so, to what extent is it included?

2. Is ground water included within the phrase "water subject to claims based on federal law" as it is used in A.R.S. § 45-251?

3. Assuming that percolating ground water is not included in the definitions of A.R.S. § [sic] 45-141 and 45-251(B), does a McCarran Amendment Adjudication, [sic] require that percolating ground water be included and if so, how can this be done under Arizona law?

4. If the answer to Issue No. 3 is in the affirmative, does the adjudication have to include only claims under federal law or must state law claims as to percolating ground water also have to be included?

5. If the answer to Issue No. 3 is in the affirmative, does the adjudicatory process extended to a determination of rights to percolating ground water which is normally in this state subject to a "reasonable use" standard to the same extent as it does to surface water which normally is subject to "prior appropriation" standard?

6. Does the "Winters" Doctrine of Federal Reserved Rights apply to percolating ground water under and/or outside of a federal reservation, how does it apply and does it apply only to the reduction of surface water resources and/or ground water resources beneath the federal reservation?

7. If percolating ground water in the watershed of the Gila River System is subject to the jurisdiction of this adjudication, what is the affect of the Ground Water Management Act of 1980?

8. Are there technical and/or procedural problems in determining, prioritizing and/or apportioning ground

water rights which present problems of such magnitude in the reliability of the data for such a determination that an attempt to prioritize ground water could violate due process requirements?

The Court will allow responses to the cities' Motion for Summary Judgment and a discussion of the above issues to be filed within 60 days of the date of this order and replies to these responses to be filed thereafter within 30 days. No parties [sic] response and reply shall exceed 30 pages for both documents but the allocation between the two shall be made by counsel. The Court will hear argument on the issue at its May hearing on May 20, 1988 at 1:30 p.m. While the 27th is the last Friday of the month, the 30th is Memorial Day and some counsel might have contrary plans for that period.

Copies of this order is [sic] mailed to all counsel on the Court's approved mailing list of December 14, 1987 which was attached to December 17, 1987 minutes.

DOCKETED

JAN 26 1988

1062

APPENDIX F

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

RC11-33390
Code

11-20-87
Date

JUDGE STANLEY Z. GOODFARB
Judge or Commissioner

D. Glab
Deputy

NO. W-1, W-2, W-3, W-4

General Adjudication

Continued

1:41 p.m. The November meeting begins with the following persons present: Duane Wyles, Riney Salmon, John Weldon, G.R. Carlock, Sheryl Sweaney, Jennele Morris, Joe Sparks, Margaret Vick, Patrick Barry, Joe Clifford, Doug C. Nelson, Alicia F. Tocco, W. Storey, Rory C. Hays, Bill Warskow, Jim Mitchell, John Schaper, Robert Hoffman, Tamara Huddleston, Tim Luke, Clay Dozer, Sandra Lee, Don W. Young, Mary Lu Moore, Dudley Welker, T.J. Harrision, Frederic Beeson, Robin Barnes, B.M. Apker, J.W. Johnson, Carlos Ronstadt, Marilyn Cage, Barbara Goldberg, Jim Callahan, Judith Dworkin, Sharen Meade, William Sullivan, Norman J. Davis, Jeff Tremly, George A. Schade, Jr, Flauviuer Carovetta, Karen Perry and Simpson Cox.

Court reporter, Terry Louis is present.

The Motion to Intervene of Tom and Evelyn Clark and Steven and Sandy Sutherland is discussed and is granted and signed by the Court.

The Motion to Intervene of SunCor Development partners is discussed and granted.

The Motion of B.C. Bass is discussed and granted and the order is signed by the Court.

After a discussion of the available dates, it is agreed that the December meeting will be held on Thursday, December 17, 1987 at 1:30 p.m., as this Court would not be available on Friday, December 18 and many counsel had other commitments on December 21st to the 24th.

The Court raises the issue of the volume of the file which relates to mailing lists. A discussion is held to reduce this volume and unnecessary work as to such lists. The Court agrees that the mailing list prepared by its clerk and attached to the minutes of each monthly meeting shall constitute the official list until changed. A certificate or statement attached to any document filed which states mailing was made to all on the official list shall be sufficient compliance for mailing. A list of all those mailed to will not be necessary. Pretrial Order #1 is amended and modified to allow such.

The Court raises the issue of the appointment of a Master by the Supreme Court and its hearing on the issue on January 7, 1988 at 9:30 a.m. D.W.R. is ordered to file with the Supreme Court its beliefs on the issues needed to be considered in the selection process. The Court also advises that it will make its own beliefs known in whatever manner the Supreme Court desires.

The Court notes it has received a report from the Steering Committee on the issue of "New Uses" of water subject to this jurisdiction, that is uses which became

effective after the closing of the date for Statements of Claim in a particular sub watershed. Any and all parties, including D.W.R., may comment on this report by 5:00 p.m. on December 8, 1987 and the Court will take up the matter at its December hearing.

A discussion is opened by the Court on the decision which the Court must make on the Ground Water and Surface Water "Interrelationship" which was the subject of the October 19th to 23rd, 1987 hearing. The Court then brought up the motion filed by numerous cities to exclude ground water from this adjudication. The Court advises it believes it appropriate to expand the citie's [sic] motion to the entire issue of the Ground Water and Surface Water Relationship, including whether or not the "Winters Doctrine" applies to ground water. It is agreed that all parties may submit a list of what issues should be included in the determination to be made, provided that no list shall exceed ten pages. The list shall also be submitted no later than 5:00 p.m. on December 8, 1987.

The Court will take up the scope of issues to be considered at its December 17, 1987 hearing. Upon its determination of the issues to be considered, all parties shall have 60 days to brief the same and 30 days thereafter to respond to the others briefs submitted. D.W.R. is specifically ordered to brief the issues ordered and respond, particularly with regards to the matters of what legal authority this Court has in this jurisdiction to act, in what ways different decisions would impact D.W.R.'s ability to provide accurate and correct information and affects upon administration of any decree arrived upon,

as well as what other issues D.W.R. as this Court's technical and administrative adviser D.W.R. [sic] believes must be considered for this adjudicative process to be meaningful.

The Court advises that after the above matters are decided, the Court in the future must begin looking at the shape, format and areas of decision which this Court's final decree should contain, so the process of this adjudication can be directed to proceed to achievement of that goal. The Court expresses the opinion that unless the process becomes goal oriented, the process will not expeditiously achieve what this adjudication needs to do.

Finally, the Court takes up the matter of the Third Set of Issues submitted by the Steering Committee and all the comments submitted thereto. All commenting parties are premitted [sic] oral statements. They are taken under advisement, but the Court requests an administrative response by D.W.R. to each comment where appropriate in twenty days and an additional ten days [sic] reply by the commentator thereafter if it desires. The Court will thereafter decide the same.

3:00 p.m. The meeting concludes.

Later: the Court having failed to take up the Motion to Intervene of Boral Concrete Products, it is ordered granting the same and order is signed.

William Sullivan of Martinez & Curtis, P.C. has been left off of the mailing list for a number of months through a clerical error. His name is now replaced on the mailing list.

IT IS ORDERED substituting the law firm of Larson, Soto & Arana as counsel for the City of Nogales in the above matter, all in accordance with the Order signed by the Court November 23, 1987.

APPENDIX G

Arizona's Principal Aquifers Map

Salt River Valley Water Users' Assoc., et al.
v. United States, et al.

Arizona's Principal Aquifers



Principal Aquifers[1]

[1] U.S. Geological Survey, July 1, 1998. *Principal Aquifers of the 48 Contiguous United States.*

Supplement to NATIONAL GEOGRAPHIC, October 1996

FEDERAL LANDS
In the Fifty States

Produced by the Cartographic Division
NATIONAL GEOGRAPHIC SOCIETY
GILBERT M. GROSVENOR, CHAIRMAN
REG MURPHY, PRESIDENT AND CEO
WILLIAM L. ALLEN, EDITOR, NATIONAL GEOGRAPHIC MAGAZINE
ALLEN CARROLL, DIRECTOR OF CARTOGRAPHY
JOHN F. SHUPE, CHIEF CARTOGRAPHER
Washington, D.C., October 1996

Albers Conic Equal-Area Projection,
Standard Parallels 29°30' and 45°30'
SCALE 1:6,766,000 or 1 INCH = 107 MILES
0 50 100 150 200 STATUTE MILES
0 50 100 150 200 KILOMETERS

Forest Service

● National forest: Covering almost 200 million acres, the country's 155 national forests make up about 25 percent of public lands, mostly in the mountains of the West and Alaska. Long guided by the concept of multiple use for sustained yield, the Forest Service seeks a sometimes controversial balance among competing demands: logging, grazing, mining, watershed protection, and recreation. Recent policies focus on managing whole ecosystems.

○ National grassland: Seventeen of the twenty national grasslands are in the western Great Plains, from Texas to North Dakota, preserving four million acres.

National Oceanic and Atmospheric Administration

● National marine sanctuary: Established following the Santa Barbara, California, oil spill of 1969, national marine sanctuaries balance use between healthy ecosystems and coastal economies. The 12 sites protect kelp forests, coral reefs, and open ocean habitats.

● National estuarine research reserve: Twenty-one reserves on state-owned lands provide natural laboratories and classrooms for research and management of estuaries. Habitats include salt marshes, mangrove forests, and sandy beaches.

● Military reservation and installation: The 27 million acres of military land, found mainly in the South and West, are home to more than 220 threatened or endangered species and contain 100,000 archaeological sites.

● Research facility or other site: DOE's 50 major sites, totaling 2.4 million acres, range from nuclear reactors and R and D labs to oil reserves and cleanup sites. The larger sites are in the West, where some grazing is permitted as well as limited public access.

Bureau of Indian Affairs

○ Indian reservation: The agency acts as trustee of Indian-owned lands amounting to 55 million acres, or 7 percent of the total territory under federal stewardship. The 300 reservations—home to more than 500 tribes—are governed by elected leaders who determine activities on their lands, which may include public camping, hunting, and fishing, as well as gambling at casinos.

Bureau of Land Management

○ BLM land: The bureau oversees some 270 million acres, about one-eighth of the country's land surface. BLM also manages the mineral rights underlying 570 million acres. Founded in 1946 to manage public lands for multiple uses while protecting the long-term health of the land, BLM oversees more acreage than any other federal agency.

U.S. Fish and Wildlife Service

● National wildlife refuge: A network of more than 500 refuges, at least one in every state, provides habitat for migratory birds, big game, and endangered species of all kinds. The system's 90 million-plus acres include some private lands set aside as easement refuges. Although refuges may be closed seasonally to protect nesting, most are open for activities ranging from nature observation to hunting and fishing.

National Park Service

● National park or other site: With some 83 million acres, the park system supervises 11 percent of public lands. National parks, which number 54 and cover more than 51 million acres, offer an increasingly urban population the joys of hiking, camping, and boating in natural settings. National preserves, covering almost 24 million acres, protect natural resources while allowing hunting, fishing, and the extraction of fuels and minerals. The park system's 369 sites also include lakeshores, seashores, and monuments that preserve cultural and historical sites. Alaska contains more than half the total acreage.

○ National recreation area: The first recreation area, at Lake Mead, was created in 1936 when the Hoover Dam impounded the Colorado River. Traditionally composed of areas surrounding reservoirs, the 38 sites now include other open spaces near urban centers. The Forest Service manages 19 areas, the Park Service 18 areas, and BLM one area.

National wild and scenic river: The Wild and Scenic Rivers Act of 1968 established this network to protect free-flowing rivers. Begun with eight rivers totaling 772 miles, the system now contains 150 stretches of river for a total of 10,700 miles.

◊ Wilderness area: In 1964 Congress passed the Wilderness Act, establishing areas "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." Four agencies administer 630 wilderness areas, encompassing 102 million acres: the Park Service (42 percent), Forest Service (33 percent), Fish and Wildlife Service (20 percent), and BLM (5 percent).

National scenic trail: The National Trails System Act of 1968 established trails in both urban and rural settings for people of all skills and physical abilities. The system, which began with the Appalachian and the Pacific Crest Trails, now includes six other continuous protected corridors.

○ ◊ Federal area of 25,000 acres or less.

Parcels of nonfederal land too small to distinguish at the scale of this map are included in the shaded federally managed areas.

Fire and Ice

Crushed more than half of Oregon, fateful rock envelops dense forest, desert heathland, and the deepest lake in the U.S., set in a caldera at Crater Lake National Park. Another volcanic pit public land, Mount Rainier in Washington, is covered by glaciers.

National Forests

Traditionally dedicated to resource extraction, such as logging or mining, national forests are now popular destinations for outdoor recreation. Making up two-thirds of Idaho, federal lands include Nez Perce National Forest, a rugged region of peaks and canyons. Federal lands blanket almost a third of Montana, including the more than two million acres of Flathead National Forest, home to grizzlies, wolves, and falcons—and renowned for camping and big game hunting.

The Central Flyway

Refuges scattered from North Dakota to Texas encompass prairie potholes, marshes, and lakes—important waterfowl breeding grounds. At J. Clark Salyer refuge in North Dakota extensive marsh and grasslands shelter more than 250 bird species. At Aransas refuge in Texas some 150 whooping cranes still winter on ancestral grounds.

Water and Woods

The Great Lakes set a shimmering stage for federal holdings. Largest island in Lake Superior, Isle Royale is known for its wolves and moose. Boundary Waters Canoe Area Wilderness is the most heavily used wilderness area in the U.S. The upper St. Croix is one of the last unspoiled rivers near a large population center. The first national lakeshore, Pictured Rocks on Lake Superior, gets its name from colorful sandstone cliffs.

BLM Lands

Federal stewardship accounts for 63 percent of Nevada—the highest proportion of any state. Most of that land is managed by the Bureau of Land Management. California's BLM lands, alone embracing 14.3 million acres, offer activities ranging from camping to rock climbing on terrain that rises from desert lowlands to mountain peaks.

Indian Lands

Governed by elected tribal leaders and administered by federal authorities, reservations offer the public many recreational opportunities. The 16.3-million-acre Navajo Reservation features a 17-mile drive among the rock spires at Monument Valley Navajo Tribal Park. On the 1.6-million-acre Fort Apache Reservation, White Mountain Apache run a major alpine ski and winter sports resort.

Caverns and Desert

Covering one-third of the state, New Mexico's federal lands evoke other worlds. Carlsbad Caverns is among the world's deepest and most ornate labyrinths. White Sands National Monument contains the world's largest field of gypsum dunes. The presence of generations beyond memory is evoked in Aztec Ruins, Bandelier, Gila Cliff Dwellings, and other monuments.

Seacoasts and Big Cities

Mountain and sea meet at Maine's Acadia National Park, established in 1919, the first east of the Mississippi. Cape Cod National Seashore, cobbled together through purchase of private lands, links 40 miles of beaches, sand dunes, and salt marshes. A new concept for the park system in 1972, Gateway National Recreation Area offers beaches, trails, and campsites to millions of urban dwellers in New York and New Jersey.

Appalachian Range

Summit of the southern Appalachian highlands, Great Smoky Mountains National Park—with peaks over 5,000 feet—preserves the world's finest remaining examples of temperate deciduous forest. More than 500 miles of trails lace the hardwood forests of Virginia's Shenandoah National Park, including a portion of the Appalachian Trail.

River of Grass

Part of a vast but vulnerable ecosystem, Everglades National Park is perhaps the most threatened of all U.S. parks. Efforts are under way to restore a more natural flow through this watery world of saw grass prairie, hardwood hammock, and mangrove forest. It is home to more than 300 bird species, including the rare and colorful roseate spoonbill, as well as the endangered manatee and Florida panther. Big Cypress National Preserve supplies fresh water to the Everglades.

Last Great Wilderness

Rich in diversity, Alaska's federal lands cover some 257 million acres—more than one-third of the national total. From Denali, or Mount McKinley—the continent's highest peak—to glacier-carved fjords, Alaska's rugged yet fragile wilderness shelters a wealth of wildlife, from shorebirds and salmon to caribou, moose, and bear.

ALASKA
SCALE 1:30,375,000
1 INCH = 500 MILES

PRINCIPAL HAWAIIAN ISLANDS

SCALE 1:4,388,000
1 INCH = 100 MILES

Mountains and Coast

Hawaii's federal domain embraces Haleakala National Park, known for its immense crater and such rare plants as the silversword, found nowhere else on earth. Hawaii Volcanoes National Park has two of the world's most active volcanoes.

To Use or To Save?

The federal domain covers a third of the nation, more than 700 million acres, a public trust unmatched in the world. It might have been entirely lost had the dispersal policy of the 19th century continued. Until the 1890s the federal government aggressively rewarded enterprise or raised revenue by giving away or selling much of the land: to homesteaders, veterans, railroads, the states—nearly a billion acres in all.

In 1901 the conservation movement gained a strong ally in President Theodore Roosevelt. Inspired by such people as naturalist John Muir, who took him camping in the Yosemite Valley of California, Roosevelt spurred citizens to preserve lands "for their children and their children's children forever, with their majestic beauty all unmarred." Roosevelt increased national forests by 150 million acres and established five national parks, more than 50 wildlife refuges, and 18 national monuments, including the Grand Canyon.

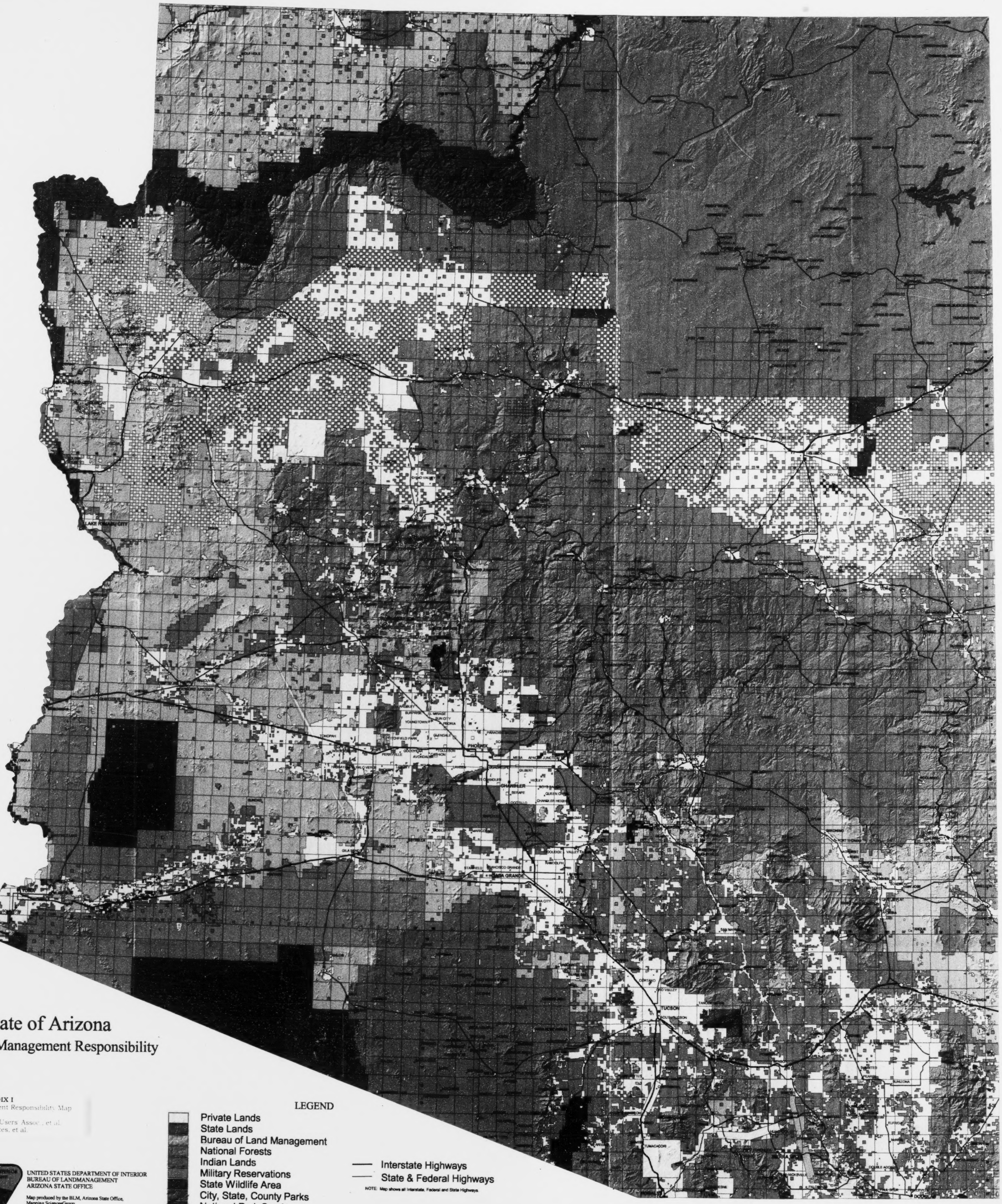
Dispersal versus preservation: These two sides still frame the increasingly heated debate over the federal lands. How can the common legacy be best managed for the greatest good to the greatest number over the longest time?

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ARIZONA SURFACE MANAGEMENT RESPONSIBILITY



State of Arizona
Surface Management Responsibility

APPENDIX I
Arizona Surface Management Responsibility Map

Salt River Valley Water Users' Assoc., et al.
v. United States, et al.

UNITED STATES DEPARTMENT OF INTERIOR
BUREAU OF LANDMANAGEMENT
ARIZONA STATE OFFICE

Map produced by the BLM, Arizona State Office,
Mapping SciencesGroup.

Land status updated as of 1994.

2nd Preliminary Edition
May 19, 1998

LEGEND

- Private Lands
- State Lands
- Bureau of Land Management
- National Forests
- Indian Lands
- Military Reservations
- State Wildlife Area
- City, State, County Parks
- National Park Service
- National Wildlife Refuges
- County Lands
- Bureau of Reclamation

- Interstate Highways
- State & Federal Highways

NOTE: Map shows all Interstate, Federal and State Highways.

SCALE 1:1,000,000

10 0 10 20 30 40 50 Miles
10 0 10 20 30 40 50 60 70 Kilometers

N

Cooperative Land Status Project

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The Arizona State Land Department and the Bureau of Land Managementmake no wemanties, implied or expressed, with respect to information shown on these maps.

BEST AVAILABLE COPY



Arizona's Principal Aquifers and Land Ownership

- Principal Aquifers[1]
- Federal Reservations[2]
- Other Federal Lands[2]
- State Land[2]
- Private Land[2]

[1] U.S. Geological Survey, July 1, 1998.
Principal Aquifers of the 48 Contiguous United States.

[2] Arizona State Land Department, Arizona Land Resource Information System, 1997.
Land (digital file).

APPENDIX J
Arizona's Principal Aquifers & Land Ownership Map

Salt River Valley Water Users' Assoc., et al.
v. United States, et al.

Nos. 99-1388
99-1389

Supreme Court, U.S.
FILED
MAR 13 2000
CLERK

In the

Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL.,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL.,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Arizona

RESPONSE OF THE STATE OF ARIZONA IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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INTRODUCTION

The State of Arizona agrees with Petitioners that this Court should grant certiorari to settle a question of vital importance to the rapidly increasing populations of Arizona and other arid western states: How should federal water needs be integrated into a non-appropriative state groundwater management scheme? In answer to the question, the Arizona Supreme Court extended to groundwater the federal reserved-right-to-water doctrine that this Court had previously applied only to appropriable surface waters. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 751 (Ariz. 1999) ("*Gila River III*").

The court arrived at this answer in error because it failed adequately to consider two important aspects of Arizona water law. First, the court did not consider it significant that Arizona law does not authorize the appropriation of groundwater, although heretofore an appropriative scheme has been an essential predicate to this Court's implication of a reserved right. Second, the court disregarded the State's comprehensive statutory scheme to manage its groundwater as a public resource, which fairly allocates groundwater supplies while ensuring that no party, federal or state, drains an aquifer dry. Consequently, the *Gila River III* decision unnecessarily displaced state law and created a class of federal rights with priority over all other rights and the arguable legal right to drain completely an aquifer on which many mutually depend. This rule unfairly prefers federal water users and interferes with Arizona's ongoing groundwater management strategies. This Court should review the

Gila River III decision to clarify the parameters of the reserved-right-to-water doctrine for the benefit of Arizona and the many courts and litigants adjudicating water rights throughout the West.

STATEMENT OF THE CASE

I. Factual and Legal Background.

A. In Arizona, Groundwater Is an Essential, Non-renewable Resource.

Precipitation in the West is both infrequent and highly variable.[1] Surface water supplies are therefore scarce, and frequently are over-appropriated.[2] "Water

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[1] Western Water Policy Review Advisory Commission Rep., *Water in the West: Challenge for the Next Century* at 2-4 (1998) (hereafter "*Water in the West*"). For example, although the mean annual flows of the Colorado River at Lees Ferry have been approximately 10.4 million acre-feet since the construction of Glen Canyon Dam, annual flows vary from a record low of approximately 4.4 million acre-feet to a record high of approximately 20.4 million acre-feet. 2 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Hydrologic Summary* 47 (1994) (hereafter "*Assessment, Vol. II*").

[2] In approximately half of the American West, as of 1986, water use exceeded stream flow during years of average precipitation. John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements, in Indian Water 1985: Collected Essays*, 25, 26-27 (1986). The Gila and Salt Rivers, which are the subject of this action, are fully appropriated and inadequate to meet the region's water needs. John A. Folk-Williams, *What Indian Water Means to the West, 1 Water in the West* (1982) (hereafter "*What Indian Water Means to the West*"), at 34, 36.

usage in Arizona exceeds available surface supply by three-fold in average years and by more in dry years." *United States v. Superior Court*, 697 P.2d 658, 663 (Ariz. 1985).

Scarce water is becoming ever more precious due to explosive population growth.[3] These new residents have collected in a series of "urban archipelagos" – areas of high population density surrounded by large, sparsely populated rural areas, in many cases far from available surface water. *Water in the West*, at 2-15. Water often must be moved many miles from its point of origin to point of use, and must be stored during years of plenty so that it will be available in times of drought. 1 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Inventory and Analysis* at 52 (1994) (hereafter "*Assessment, Vol. I*"). Many Arizona communities with no renewable water supplies rely primarily on groundwater because they have "no practical, affordable alternative." *Assessment, Vol. I*, at 52. In fact, groundwater "is the primary water supply in most areas of the State." *Assessment, Vol. I*, at 9. From 1986-1990, groundwater accounted for approximately 50% of all water use in Arizona. *Id.* at 10.

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[3] The West is now home to nearly one-third of the American population. *Water in the West*, at 2-14. Over the past 25 years the populations of western states grew at a rate almost twenty times that of the rest of the nation, and the West is projected to add another 28 million residents by the year 2025. *Id.* Between 1990 to 1994, Arizona was the third-fastest growing state in the nation, with a population growth rate of 11.2%, and populations concentrated in the Phoenix and Tucson metropolitan areas. *Id.*

Other western states also depend heavily upon groundwater.[4]

Fortunately a vast reservoir of underground water underlies virtually the entire State of Arizona.[5] The U.S. Geological Survey has estimated that Arizona has approximately 1.9 billion acre-feet of water stored underground. David A. de Kok, *The Geography of Water Availability and Use in Arizona, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 30, 34 (1997) (hereafter *"The Geography of Water Availability"*). Although there is some natural and artificial groundwater recharge, most of Arizona's groundwater reservoir has been in storage for thousands of years. *Assessment Vol. I*, at 9.

Flexible strategies to manage groundwater and surface water in a coordinated way that makes water available at the right time and place to meet demand are essential to allow continued economic growth and development throughout the State. *Assessment, Vol. I*, at 52-53.

B. Arizona Law Has Adapted to Provide Effective Groundwater Management Appropriate to Local Circumstances.

Arizona today administers its groundwater resources under one of the most comprehensive groundwater

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[4] Groundwater contributes about one third of the total water supply in the 19 western states, and approximately 87% of the self-supplied domestic water. *Water in the West*, 2-7.

[5] U.S. Geological Survey, *Annual Summary of Ground-Water Conditions in Arizona, Spring 1984-1985*, USGS Open-File Report 86-422W (1986); Appendix to Petitions for Writs of Certiorari ("App."), App. G.

management systems in the United States.[6] The Arizona Legislature enacted the Arizona Groundwater Code, Arizona Revised Statutes ("A.R.S.") §§ 45-401 to -704, in 1980 after decades of groundwater overdraft led to significant decline in water tables in some critical areas.[7] The Legislature has acknowledged the State's dependence upon groundwater and the dangers of aquifer depletion, and has set a goal of balancing withdrawals and recharges of those aquifers by the year 2025. *See* A.R.S. § 45-401; *Assessment, Vol. I* at 55-56. This balance is to be achieved

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[6] One commentator has referred to the Groundwater Code as "[p]erhaps the most comprehensive groundwater code in the nation." Jeffrey Gross, *Transboundary Water Quantity: The Effect of Arizona and Mexican Groundwater Law on Arizona's Agriculture*, 1988 Ariz. J. Int'l & Comp. L. 189, 190.

[7] Extensive groundwater pumping began shortly after the development of efficient turbine pumps. T.W. Anderson, et al., U.S. Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States* 26 (1992). In 1923 pumping exceeded 500,000 acre-feet per annum and exceeded for the first time natural recharge. Pumping increased to 1 million acre-feet in 1934, 2 million acre-feet in 1945, 3 million acre-feet in 1948, 4 million acre-feet in 1953, and 5 million acre-feet in 1961, reaching an all-time high of 5.7 million acre-feet in 1974. *The Geography of Water Availability.* Prolonged periods of uncontrolled groundwater pumping between the late 1940's and the late 1970's and cumulative groundwater overdraft led to significant declines in water tables in some critical basins. Declines of 50 to 200 feet were common in the Central Arizona basin, and in some locations the water table dropped almost 500 feet. *Water in the West*, p. 2-7; *The Geography of Water Availability*, at 32-33, 36.

in part by providing for the orderly retirement of agriculture in critical groundwater basins.[8] Arizona's adoption of this comprehensive Groundwater Code, and its commitment to the Central Arizona Project ("CAP") and concomitant restrictions on groundwater use,[9] demonstrate that Arizona recognizes the importance of groundwater and will take appropriate action to conserve this precious, non-renewable resource.

The Groundwater Code establishes three levels of water management. Management is most intensive in Active Management Areas ("AMAs"), which are geographic areas where groundwater supplies are being depleted. *See* A.R.S. § 45-402(2). Each AMA is assigned a groundwater management goal that is designed to ensure the sustainability of Arizona's groundwater supplies. A.R.S. § 45-562.[10] The Groundwater Code initially established four AMAs, which accounted for 69 percent of the total groundwater overdraft in the state and included 80 percent of the State's population.[11] By amendment to the

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[8] Agriculture accounted for 79.7% of total demand for Arizona's water in 1990; that percentage is projected to decrease to 72.8% of total demand by 2015, and 66.2% of total demand by 2040. *See Assessment, Vol. I*, at 16-17.

[9] *See Assessment, Vol. I* at 55-56.

[10] Achievement or maintenance of "safe-yield," or long-term balance between annual withdrawals and recharge, is the management goal of the Phoenix, Tucson, Prescott and Santa Cruz AMAs. See A.R.S. §§ 45-561(12), -562. The management goal in the Pinal AMA is to allow some depletion "consistent with the necessity to preserve future water supplies for non-irrigation uses." A.R.S. § 45-562(B).

[11] *Cherry v. Steiner*, 543 F. Supp. 1270, 1278-79 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983). The Tucson, Phoenix,

Code a fifth AMA was established in 1994.[12] The Department of Water Resources is authorized to establish additional AMAs where "necessary to preserve the existing supply of groundwater for future needs." A.R.S. § 45-412(A)(1). Within AMAs new uses of groundwater are generally prohibited or severely limited.[13]

The management of agricultural irrigation, both within and outside of AMAs, is also intensive. To meet the water demands of its burgeoning population without depleting non-renewable groundwater supplies Arizona already has taken painful steps to reduce agricultural uses, which have accounted for most groundwater pumping.[14] The Groundwater Code prohibits irrigation of lands that were not historically irrigated both within

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Prescott and Pinal AMAs were established as of June 12, 1980. A.R.S. § 45-411(A).

[12] The Santa Cruz AMA was established as of July 1, 1994. A.R.S. § 45-411.03.

[13] *See* A.R.S. § 45-491 to -498. While new withdrawals for domestic uses are permitted under A.R.S. § 45-492, no additional industrial uses will be allowed, except where designed to require maximum conservation. *See* A.R.S. § 45-497. Industrial users will be required to purchase and retire irrigated lands if available. *Id.* Municipalities and water companies may withdraw enough water within their service areas to serve their customers, but are restricted from extending their service areas and the types of services that they provide. *See* A.R.S. §§ 45-493(A) & (B).

[14] Robert Jerome Glennon, *Because That's Where the Water Is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act*, 33 Ariz. L. Rev. 89, 90-91 (1991).

AMAs and outside of AMAs in areas known as "irrigation non-expansion areas" ("INAs"), where expanded withdrawals of groundwater cannot safely be supported. *See* A.R.S. §§ 45-431, -437, -452, and 45-493(C); *Cherry*, 543 F. Supp. at 1275. The Groundwater Code thus prevents expansion of the agricultural land base in those parts of the state where groundwater supplies are imperiled. As urbanization reduces the agricultural land base, groundwater consumption will also decline and renewable water supplies that have been used for agriculture will become available for other uses.

The third level of management includes laws that are generally applicable statewide. *See, e.g.*, A.R.S. § 45-403 (designation of groundwater basins); A.R.S. §§ 45-541 to -559 (restrictions on transporting groundwater from one area of the State to another); A.R.S. §§ 45-591 to -605 (mandatory well registration and construction requirements); A.R.S. § 45-108 (requirements for land developers to evaluate and report water availability, with restrictions on development in areas without an "assured water supply"). These laws operate in tandem with the doctrine of reasonable use that is applicable outside of AMAs and INAs. A.R.S. § 45-453. This doctrine allows a landowner the right to put the land to use, whether it be for irrigation, industrial enterprise or domestic homesteading, and to extract a reasonable amount of the common groundwater supply to accomplish that use. *See* A.R.S. § 45-453; *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). Even in these rural areas, however, landowners merely have a right to the usufruct of the nonappropriable groundwater. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1981). The water itself is a state resource and the

right to use it is subject to state regulation. A.R.S. § 45-141; *Cherry*, 543 F. Supp. at 1275.

Reasonable use does not equate to excessive use. Arizona has studied water use outside AMAs and found that in such "reasonable use" areas the scarcity of water, concern for sustainability, and the cost of developing water are more significant limitations on use than a comprehensive regulatory scheme. One study shows that per-household domestic use was .5 acre-feet per year, below the standards set in many AMAs. Arizona Dep't Water Resources, *Technical Report on De Minimis Adjudication of Domestic Stock Pond and Other Stockwatering Uses in San Pedro River Watershed* (1993), at Appendix A-3. If more comprehensive regulation is needed to address changing circumstances, the State can regulate water use administratively or through legislation tailored to fit the changed circumstances.

Arizona already has achieved significant reductions in groundwater diversions. Total annual groundwater diversions in the four AMAs have declined from 3,166,000 acre-feet per annum during the period from 1971-1975 to 1,760,000 acre-feet per annum during the period from 1986-1990. *Assessment, Vol. I*, p. 70. The State also has taken very significant actions to enhance water supplies.[15]

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[15] Such measures include the construction of the Central Arizona Project ("CAP"), *Assessment Vol. I* at 55-56; *see generally Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1122-23 (D. Ariz. 1998). They also include establishment of the Arizona Water Banking Authority to store Colorado River water in the state's central aquifers, *see* Bonnie

Arizona's Groundwater Code mandates safe-yield or sustainability in active management areas, limits new irrigation, and allows reasonable use in remote, rural areas until a need develops for more active management of the groundwater supplies. By protecting the common supply of groundwater Arizona law protects the interests of federal reservations in such water.

II. The Proceedings Below.

The decision below is the latest in a series of opinions arising from the Gila River General Stream Adjudication, in which the Arizona Supreme Court has established certain ground rules for Arizona's general stream adjudications.[16] *See Gila River III*, 989 P.2d 739; *In re the Gen.*

G. Colby, et al., *Economics of Water Scarcity, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 108 (1997); A.R.S. §§ 45-2401 to -2472; the "Recharge Program," which allows entities with surplus renewable water supplies to store that water in underground aquifers, *see* A.R.S. §§ 45-801.01 to -891.01; *Water in the West*, p. 3-10; *The Geography of Water Availability* at 93; and regulatory programs to encourage effluent use as part of the AMA management plans. *Id.* at 94.

[16] In Arizona a "general stream adjudication" is "an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source." A.R.S. § 45-251(2). The statute defines a "river system and source" to be "all water appropriable under § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251(7). Arizona's general stream adjudications therefore encompass two types of water: waters that are "appropriable" and waters that are "subject to claims based upon federal law." The United States and several Indian tribes were joined as parties to the adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666.

Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 857 P.2d 1236 (Ariz. 1993) ("*Gila River II*"); *In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992) ("*Gila River I*").

Due to the unparalleled size and scope of the case, *see Gila River I*, 830 P.2d at 446, the trial court understandably was reluctant to spend decades adjudicating tens of thousands of individual claims according to the wrong legal standards. Accordingly, the trial judge identified eight legal issues to be resolved before individual claims were adjudicated, and decided those issues after hearings and briefings which focused on the connection between groundwater and surface water. App. D2-D3. The trial court ruled, among other things, that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [Practically Irrigable Acreage] if the land is an Indian reservation." App. D23. The trial court did not consider or discuss evidence of the purposes and needs of any specific federal reservation. App. D16-D23.

The Arizona Supreme Court granted review of the trial court's ruling on federal reserved water rights as two of six issues that it "reformulated" in an order granting interlocutory review. See Orders Concerning Petitions for Interlocutory Review, App. B.[17] In the decision below,

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[17] Interlocutory review was granted pursuant to a special procedural order that provided for expedited appellate review of trial court decisions of important legal issues in the case. The procedural order is reproduced as Appendix A to the *Gila River I* decision, and at App. C.

the court began with the proposition that a reserved right to water will be implied where the purpose of a federal reservation of land would otherwise be defeated, citing *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963). The court expressed concern that "some reservations lack perennial streams," and thus their purpose could be frustrated without access to groundwater. *Gila River III*, 989 P.2d at 746. On the basis of *Cappaert v. United States*, 426 U.S. 128 (1976), the Arizona Supreme Court reasoned that this Court would not differentiate between surface and groundwater when identifying the source of a federal reserved right. *Gila River III*, 989 P.2d at 746. Finally, the court concluded that it could not defer to state law on this issue, because the doctrine of reasonable use would allow impairment of federal access to groundwater, as indicated by the historic depletion of groundwater in the absence of other legal constraints. *Gila River III*, 989 P.2d at 748. The opinion was almost devoid of discussion of the Groundwater Code, although a number of federal reservations border AMAs and therefore benefit from the statutory restrictions on groundwater use.[18] The Arizona Supreme Court held that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Gila River III*, 989 P.2d at

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[18] For example, the Gila River Indian Reservation is situated between the Phoenix and Pinal AMAs; the Tohono O'Odham Reservation borders the Tucson and Santa Cruz AMAs, and the Yavapai Prescott reservation borders the Prescott AMA. *Assessment, Vol. I*, at 68, 84; App. I.

751. In effect, the court equated need for water with need for a reserved right.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. The Decision Below Is Inconsistent With Decisions of this Court and of the Supreme Court of Wyoming.

This Court should grant certiorari to correct the Arizona Supreme Court's misapplication of prior decisions of this Court, and to resolve the conflict between the decision of the Arizona Supreme Court in *Gila River III* and the decision of the Wyoming Supreme Court in *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"), which properly reached the opposite conclusion. 753 P.2d at 99-100.

Gila River III is an unwarranted extension of this Court's precedents regarding federal reserved rights to water. This Court has previously implied reserved water rights on a case-by-case basis only where absolutely necessary to prevent the frustration of the purpose of a particular federal reservation under state law schemes that allocated water based upon priority of use. *See United States v. New Mexico*, 438 U.S. 696, 700 (1978). Such rights are implied only after careful review of the underlying legal instruments by which the particular reservation was created. *See Winters*, 207 U.S. at 575-76 (existence of federally reserved rights "turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation."). Moreover, this Court has never applied the *Winters* doctrine to groundwater; in fact, it has

carefully refrained from doing so. *See Cappaert*, 426 U.S. at 138, 142.

Notwithstanding this Court's restrained and careful approach to implied reserved rights, the Arizona Supreme Court concluded that a reserved right to groundwater should be implied based upon *Cappaert*, 426 U.S. at 138. *Gila River III*, 989 P.2d at 745. Although the existence of water available for appropriation was essential to the *Cappaert* analysis, the court ignored language in *Cappaert* referring to the reservation of *unappropriated* water, which strongly suggests that the *Winters* doctrine should only be applied where water is allocated under the doctrine of prior appropriation. *Cappaert*, 426 U.S. at 139. The Arizona Supreme Court inexplicably did not analyze the issue of whether groundwater that is *not appropriable* under state law is *available for appropriation* and therefore subject to the federal reserved rights doctrine.

Arizona adopted a bifurcated system of water rights. Surface water and a narrowly defined subflow zone that is directly associated with the stream are subject to the doctrine of prior appropriation. Percolating groundwater, *i.e.*, underground water that is not directly associated with a stream, cannot be appropriated under Arizona law. *Bristor*, 255 P.2d at 177. Instead, it is considered a common supply that is equally available to the owners of overlying lands, for use on those lands, limited by the common law doctrine of reasonable use and state statutory law. *Gila River II*, 857 P.2d 1236, 1240; *Town of Chino Valley*, 638 P.2d at 1328. Arizona's bifurcated system reflects its deliberate policy choice to encourage decentralized development of a limited water supply and to

discourage the monopolization of control over water. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 373 (Ariz. 1931).

Instead of concluding that there can be no federal reserved right to groundwater in Arizona because groundwater is not available for appropriation, the Arizona Supreme Court in *Gila River III* found that all groundwater in the State is "unappropriated and thus available" to be reserved for federal use. Such a rule gives federal interests an unintended priority over all other groundwater users, based on a legal doctrine that is predicated on a need – the need to reserve water essential for federal purposes from prior appropriation by non-federal entities – that does not exist where groundwater is not subject to prior appropriation under state law. Significant inequities, uncertainties, inter-governmental conflicts, and interference with the State's management of a shared public resource is likely to result. This Court should grant certiorari to clarify that the federal reserved-right-to-water doctrine does not apply to groundwater that is not appropriable under state law.

II. The Decision Below Unnecessarily Displaces State Law and Impairs State Management of Groundwater Resources, Contrary to Established Federal Policies of Deference to State Water Law.

In holding that federal reserved rights extend to groundwater and therefore take priority over other uses, the Arizona Supreme Court unnecessarily displaced state law and impaired the State's ability to manage its groundwater resources. The Court should grant certiorari

to clarify that federal law does not displace state water law unless the application of state law would frustrate federal purposes, because water management is best accomplished through state law that can be tailored to local needs. As the Water Policy Review Advisory Commission[19] stated in its 1998 report:

> Achieving sustainable groundwater use is one of the major water management challenges facing the West. This is primarily a state rather than a federal responsibility. Even though it is widely understood that ground- and surface-water resources are interrelated, most states continue to manage ground and surface water by different legal regimes. The majority of western states administer surface waters under the doctrine of prior appropriation or by a mixed appropriative-riparian system. However, groundwater governance regimes display less uniformity and are typically far less well defined, making it more difficult for states to manage limited supplies.

Water in the West, p. 3-6.

Arizona is one of several states that apply prior appropriation principles only to surface water and a narrowly defined subflow zone that is directly associated

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[19] The Commission was appointed pursuant to a 1992 act of Congress to assist the President in fulfilling his responsibility to make findings and recommendations to Congress regarding federal activities in Western states that directly or indirectly affect the allocation and use of water resources. *Water in the West* at 1-2 to 1-5.

with the stream.[20] Over more than 100 years, Congress has deliberately allowed for the development and application of state water law, even on public lands. *See generally California v. United States*, 438 U.S. 645, 653-70 (1978). Congress purposefully deferred to state law in matters of water rights because, as then Representative Sutherland stated, "if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail" and "[d]ifferent water rights in the same State would be governed by different laws and would frequently conflict." *Id.* at 667-68; *see also United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984). Such deference to state law is appropriate even where federal rights are at issue, so long as the federal purpose is not frustrated or impaired. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979).

Although states must protect federal interests in groundwater, this Court has never declared that federal law requires application of prior appropriation principles to groundwater, or that federal interests must be absolutely protected against the effects of water shortage without regard to the needs of other water users. Instead of imposing an inflexible rule to guaranty absolute protection of federal water rights, Congress and this Court have allowed states the flexibility to choose the most

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[20] The other states are California, Hawaii, Texas, Nebraska and Oklahoma. Water Resources Research Center, University of Arizona, *How Western States Manage Interconnected Groundwater and Surface Water* 3 (1994); *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

appropriate methods for allocation and conservation of water, so long as federal interests are fairly accomodated.

Arizona has chosen to accommodate state and federal interests by maintaining a non-appropriative system of groundwater management. The State has considered this system adequate to protect its considerable property interests including 9.4 million acres of trust lands, which the State holds as trustee for the benefit of schools and other institutions.[21] These trust lands are located in all parts of the State, are largely undeveloped, are intermingled with private lands and federal reservations, and share access to underground aquifers. App. I, J. Although Arizona has asserted claims for water in the nature of a reserved right,[22] to date it has not asserted priority over other groundwater users on the basis of this reserved right, in the belief that its ownership of the overlying land affords reasonable use of the shared aquifers. There

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[21] Sections 16 and 36 of every township were reserved for the future state of Arizona when the Territory of New Mexico was created. Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452. The reservation of lands was confirmed when the Territory of Arizona was created. Act of Feb. 24, 1863, §§ 1-2; 12 Stat. 664, 665. Upon its admission to the United States, Arizona was granted sections 2, 16, 32, and 36 in every township, or lands in lieu thereof where the numbered sections were unavailable, and certain additional lands. Arizona-New Mexico Enabling Act, Act of June 20, 1910, 26 Stat. 557, 572 (1910). These lands are held in trust subject to restrictions imposed by the Enabling Act and the Arizona Constitution. *Lassen v. Arizona*, 385 U.S. 458, 460 n. 2 (1967); *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 244 (Ariz. 1990).

[22] Peter W. Sly, *Reserved Water Rights Settlement Manual* (1988) at 45-46.

exists no logical or legal basis for affording greater protection to underground water needed by newly created national monuments than to underground water needed for development of the State's trust lands, or by the millions of people who settled in Arizona and became dependent upon groundwater for a myriad of uses.

The *Gila River III* decision would result in a system in which only federal water users have a date of priority. This results because one attribute of a federal reserved right is priority for the entire right over persons who appropriate water after the date of the reservation. *Cappaert*, 426 U.S. at 138. It may be argued that because Arizona does not allocate groundwater based upon priority of initiation of use, application of the reserved-right-to-water doctrine to groundwater in Arizona would mean that when supplies are low even the most recent federal uses would continue unabated while even the most long-standing state-law based uses would bear the entire burden of shortages.[23] It also might be argued that the *Gila River III* decision would allow any federal user to drain the common aquifer for a low value use, such as pasture

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[23] The establiishment of the Agua Fria National Monument by Presidential Proclamation on January 11, 2000, provides a good example of the potential problem caused by the *Gila River III* decision. Proclamation No. 7263, 65 Fed. Reg. 2817 (2000). The Proclamation reserves "subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established." It is possible that federal representatives will assert that the *Gila River III* decision grants superior rights to groundwater to the Agua Fria National Monument, with a priority date of January 11, 2000, over groundwater pumping, lacking a priority date, that has historically occurred in the area under state law.

or irrigation, while local municipal wells in the same aquifer run dry. The decision also positions federal claimants to object to all off-reservation pumping, on the theory that every well interferes with superior federal reserved rights.[24]

These consequences could and should have been avoided, without jeopardizing federal water rights, by simply applying the non-discriminatory state law as the rule of decision, instead of creating a special federal rule. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979); *Kimbell Foods*, 440 U.S. at 728; Petition for Writ of *Certiorari* filed by Phelps Dodge Corporation, *et al.* at pp. 16-22.

III. This Court Should Settle the Important Question of Whether The Implied-Reservation-of-Water-Doctrine Extends to Groundwater to Reduce the Substantial Uncertainties Affecting Millions of Americans in Western States.

McCarran Amendment adjudications have been filed in Arizona and at least nine other states. Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L.Q. 627, 635 n. 48 (1988). Because such proceedings must adjudicate

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[24] The United States and various Indian tribes in fact filed over 11,000 objections to wells listed in the San Pedro River Hydrographic Survey Report on the basis that pumping by those wells interferes with or is subject to federal reserved rights. See objections on file at the Arizona Department of Water Resources identified with Special Master's Uniform Objection Code Nos. 561, 562, and 1134.

the rights of all claimants to water from a particular river system, they involve numerous parties and attorneys, and are both unwieldy and time-consuming.[25] All participants in general stream adjudications need to know the ground rules that will determine their rights. This Court's grant of certiorari would settle an important, unresolved question of federal law and reduce the likelihood that legal error will infect pending general stream adjudications for decades to come.

Federal reserved rights claims create a great deal of uncertainty about the rights of other water users, due to the size and number of federal claims[26] and the fact that the rights are unquantified because they are not based on actual, historical use. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 824-25 (1976) (Stewart, J., dissenting). Delayed quantification of

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[25] The Gila River adjudication involves tens of thousands of litigants and has been pending for over 25 years. The Big Horn adjudication in Wyoming involved more than 100 attorneys in the first six years of litigation, and produced transcripts in excess of 15,000 pages and more than 2300 exhibits. *See Big Horn*, 753 P.2d at 85.

[26] Nearly three-fourths of the land in Arizona is owned by the federal government. App. A14, I, J. Over 3.3 million acre-feet of water have been claimed for Arizona's 19 Indian reservations, and additional claims have been asserted for national forests, parks, monuments, and other federal enclaves. In *Arizona v. California*, Indian reservations located along the Colorado River were awarded approximately 900,000 annual acre-feet and other federal enclaves in Arizona, including the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Lake Mead National Recreation Area, Arizona were awarded over 79,000 acre-feet per year. *Arizona v. California*, 373 U.S. 546, 598-600 (1963).

federal and tribal water rights leads to an inequitable situation for Indians and creates uncertainty for all other water users.[27] Because federal rights inescapably vie with other public and private claims for the limited quantities of water, delay also increases the likelihood that established uses, developed at considerable cost, will be disrupted.[28] Uncertainty hampers the resolution of these competing claims. As the Western Water Policy Review Advisory Commission warned:

> [M]any states have undertaken McCarran Amendment adjudications. These adjudications have proved to be long and costly and have not yet produced the desired quantification of existing rights. *The more uncertain rights are, the more water right holders resist participation in conflict resolution processes because of concerns that claimed rights will be diminished.*

Water in the West, 2-39 (emphasis added).

This Court should grant review to reduce the uncertainty about the nature and extent of federal reserved rights, thereby facilitating the resolution of pending and future adjudications.

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[27] As of 1995, there were more than 60 court cases pending involving Native American water rights, potentially affecting the distribution of more than 60 million acre-feet of water. *Water in the West*, 2-28.

[28] Huge amounts of private capital have been invested in the development of water resources. *California v. United States*, 438 U.S. 645, 649 n. 3, 655 (1978); *Bristor*, 255 P.2d at 175.

CONCLUSION

For the foregoing reasons, and for the other reasons stated in the Petitions for Certiorari, the Court should grant the Petitions for Writs of Certiorari.

Respectfully submitted March 13, 2000.

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Nos. 99-1388 and 99-1389

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On Petitions for Writ of Certiorari to the Supreme Court of the State of Arizona

BRIEF OF THE HOPI TRIBE, THE NAVAJO NATION AND THE SAN JUAN SOUTHERN PAIUTE TRIBE IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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INTRODUCTION

In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Court remanded this comprehensive stream adjudication to the Arizona courts for decision with twin admonitions: (1) "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law," *id.* at 571, and (2) "[b]ecause of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by a

'historic immunity from state and local control.' " *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)). The Arizona courts have faithfully carried out this mandate. Thus, the Arizona Supreme Court determined, as a general principle of federal law, that tribal reserved water rights *may* include groundwater, depending upon the purposes for which each separate reservation was established and the availability of surface water supplies, both questions which had not yet been litigated. In so ruling, the Arizona court rejected application of the unique Arizona groundwater law which permits non-Indian pumpers without penalty to drain the aquifers under federal and tribal lands. Despite the interlocutory nature of the Arizona Supreme Court's decision, petitioners rush to seek this Court's review of a, to them, disappointing result from the state courts for whose jurisdiction they had previously argued so vigorously.

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, the Hopi Tribe, the Navajo Nation and the San Juan Southern Paiute Tribe (collectively the "Little Colorado River Tribes"), are parties, *inter alia*, to a general stream adjudication involving the watershed of the Little Colorado River. That litigation presents many of the same legal issues, including the question here presented in the petitions for a writ of certiorari, that have been raised in *In re the General Adjudication of All Rights to Use Water in the Gila River System*. *See* Appendix to Petitions for Writ of Certiorari A7 (hereinafter App.). Accordingly, the Arizona Supreme Court permitted the Little Colorado River Tribes to participate as interested parties in the proceedings below. *Id.* at A6. Indeed, the respondents have a particularized interest in the Arizona court's holding with respect to groundwater because, as pointed out more fully hereinafter, the Little Colorado Tribes' reservations are located on some of the most arid lands in the United States and, for the most part, lack a reliable supply of surface water.

A. *The Navajo Nation*: The Navajo Indian Reservation occupies an area covering approximately 25,000 square miles, or 15,432,170 acres, in Arizona, New Mexico and Utah, and was home to a population of approximately 219,200 as of 1990. DAVID H. GETCHES *ET AL.*, FEDERAL INDIAN LAW, CASES AND MATERIALS 9-13 (3d ed. 1993). As originally established by the Treaty of June 1, 1868, 15 Stat. 667, the reservation did not encompass all of the lands then occupied by the Navajo Nation. Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371, 375 (1985). The inadequacy of the 1868 Reservation was especially marked in the Little Colorado River basin in Arizona. Since 1868, the President by executive order—later ratified by Congress—expanded the reservation. *E.g.*, 25 U.S.C. § 398d; Exterior Boundaries of Navajo Reservation in Arizona, C. 521, 48 Stat. 960 (1934). Much of the Navajo Indian Reservation is wholly dependent upon groundwater for drinking water, stock raising and agriculture. Other portions are dependent upon surface water that could be depleted by off-reservation groundwater pumping.

B. *The Hopi Tribe*: Since long before Spanish explorers arrived in the Southwest, the Hopi Tribe has been dependent upon groundwater for drinking water, religious uses and gardens. The Hopi people have located their villages in order to have access to springs, which are sacred to them. Because there are no perennial streams on the Hopi Reservation, every Hopi village depends upon groundwater for drinking water, stock ponds and agriculture. The majority of irrigated acreage on the Hopi Reservation is watered from springs, or spring-fed ephemeral stretches of otherwise dry washes. Groundwater is essential to the survival of the Hopi people on the reservation set aside as their permanent homeland. *See* Treaty of Guadalupe Hidalgo, February 2, 1848, U.S.- Mex., arts. VIII, IX, 9 Stat. 922; Executive Order of December 16, 1882.

C. *The San Juan Southern Paiute Tribe*: The San Juan Southern Paiute Tribe has historically occupied lands in the Little Colorado River basin.[1] In the area occupied by the Tribe, except for one minor wash that runs briefly only in the wettest years, the only source of available water is groundwater. Through springs and wells, the Tribe uses groundwater for its domestic and agricultural needs. Given the location of its homeland, its claims are solely to groundwater. The Tribe's future survival on its arid lands can be assured only if the Tribe's right to groundwater is recognized.

STATEMENT OF THE CASE

A. *The Little Colorado River Adjudication*: The Little Colorado River basin encompasses an area of 26,964 square miles in northeast Arizona and northwest New Mexico. Indian lands occupied by five Indian tribes, including the Little Colorado River Tribes, account for approximately 11,000 square miles of the approximately 21,700 square miles in the basin in Arizona.

The Little Colorado River stream adjudication began in 1978 with the filing by the Phelps Dodge Corporation of a petition with the Arizona State Land Department to determine conflicting water rights in that basin. Today there are approximately 3,100 claimants in the Little Colorado River adjudication who have filed nearly 11,000 statements of claims. The major claimants, in addition to the Little Colorado River Tribes, include non-Indian communities (such as Show Low, Snowflake, Springerville, St. John, Holbrook, Winslow, and Flagstaff), large industrial users (such as Arizona Public Service, Phelps Dodge Corporation, Salt River Project, and Tucson Power & Electric), irrigation

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[1] Although the Tribe does not presently have a formal reservation, the court in *Masayesva v. Zah*, 794 F. Supp. 899 (D. Ariz. 1992), determined that the Tribe has a joint interest with the Navajo Nation in approximately 26,000 acres of land, and an exclusive interest in a smaller area, all northwest of Tuba City on the Navajo Indian Reservation.

companies (such as St. Johns, Silver Creek and Show Low Irrigation Companies), and the United States. The rights of all these parties are closely intertwined.

> [B]y reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 811 (1976) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951)). "This concern is heightened with respect to water rights, the relationships among which are highly interdependent." *Id.* at 819.

Although the Little Colorado River adjudication started over twenty years ago, the respective rights of the parties to water have not yet been determined, nor have most of the underlying legal and factual questions ever been litigated. This delay is due in part to an early dispute over the appropriate court to try the case,[2] in part to changes in the order the claims were to be heard,[3] and in part to stays during the course of protracted (and still on-going) settlement discus-

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[2] The Navajo Nation filed an action seeking, ultimately unsuccessfully, to have its water rights in the Little Colorado River basin adjudicated in federal court. *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982), *rev'd sub nom. Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Thereafter, the United States and the Navajo Nation sought, again unsuccessfully, to dismiss the state court adjudication. *United States v. Superior Court*, 697 P.2d 658, 671-73 (Ariz. 1985).

[3] By a pre-trial order dated April 24, 1987, the Superior Court directed that first consideration be given to water rights in three sub-basins of the Little Colorado River, which mainly involved the claims of non-Indians under state law. By order dated January 27, 1994, the court modified its approach to the litigation by directing the parties to turn their attention to the tribal claims.

sions.[4] The Little Colorado River Tribes have also participated actively at the trial court level and before the Arizona Supreme Court in briefing and oral argument during both the interlocutory consideration of certain significant legal questions and the prosecution of two Special Actions arising in related litigation, *In re the General Adjudication of All Rights to Use Water in the Gila River*. App. A7-A9.

B. *The Proceedings Below*: Like the Little Colorado River adjudication, the Gila River adjudication is still in its infancy. In December 1990, addressing an interlocutory appeal by various parties to the Gila River proceedings, the Arizona Supreme Court identified six issues that it would address on an interlocutory basis. *See* App. B. Two of those issues—whether groundwater, in the absence of available surface water, may be considered to satisfy federal reserved rights under the doctrine first announced in *Winters v. United States*, 207 U.S. 564 (1908), and whether federal rights to groundwater are entitled to protections which differ from those provided under state law—were the subject of the Arizona Supreme Court's decision below. The Arizona court answered both questions in the affirmative, although petitioners seek review here only of the decision on the first question.

In addressing the applicability of the reserved rights doctrine to groundwater, the Arizona court first noted that the task in water rights adjudication is to examine the conflicting claims to water under state and federal law, stating "[a]n adjudication such as this cannot achieve its comprehensive purpose without quantifying and prioritizing federal, as well as state law, claims." App. A13; *accord Arizona v. San*

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[4] As petitioners have pointed out, "there have been four settlements approved by the Gila Adjudication court that resolve some or all of the claims of specific Indian tribes within the basin." Phelps Dodge Pet. at 5 n.2. *See also* Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat.1261, 1274 (Papago Tribe).

Carlos Apache Tribe, 463 U.S. 545, 552, 570 (1983). Quoting this Court's decision in *San Carlos Apache Tribe*, the court noted that it must apply "federal substantive law to measure federal rights in [this] state adjudication." App. A15. In defining the scope of the reserved rights doctrine, the court also quoted from *Cappaert v. United States*, 426 U.S. 128, 138 (1976), to establish, among other principles, that water is reserved "to the extent needed to accomplish the purpose of the reservation." App. A15.

Turning to the question of whether groundwater at least theoretically could be reserved, the Arizona Supreme Court carefully considered whether, under existing precedent, groundwater could be counted among the resources available to satisfy federal reserved rights to water. Relying on *Winters*, 207 U.S. at 569, and *Arizona v. California*, 373 U.S. 546, 599 (1963), the Arizona court held:

> The reservations in those cases depended for their water upon perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life.

App. A19.

The Arizona court bolstered its holding that groundwater may be included to satisfy federal reserved water rights by looking to this Court's holding in *Cappaert*. There, the Court recognized surface water and groundwater as "integral parts of the hydrologic cycle." App. A19 (quoting *Cappaert*, 426 U.S. at 142). Because of such integration, there is no difference between "surface and groundwater when identifying the water to be protected." App. A20. According to the court, "[t]he significant question for the purpose of the

reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.*

Finally, the court stated that it was deciding the issue "in the abstract" and that it was not holding "that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." App. A24. The court further explained that "[t]o determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *Id.* (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)). Finally, the court admonished that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." App. A24.

The present petitions followed.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ARIZONA SUPREME COURT IS NOT A FINAL JUDGMENT OR DECREE AND THUS IS NOT SUBJECT TO REVIEW UNDER 28 U.S.C. § 1257(a).

A. Petitioners admit the ruling below is interlocutory.

The Arizona Supreme Court has concluded, as a matter of federal law, that the reserved water rights of Indian tribes, recognized and protected by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963), may include underground water as well as surface water depending upon the facts and circumstances surrounding the establishment of each reservation. The court below heard this issue on appeal pursuant to a 1989 Special Procedural Order Providing for Interlocutory Appeals and Certification and at an early stage of proceedings before the

trial court. *See* App. C. Among other outstanding questions, the trial court has yet to determine, as it eventually must, the nature and extent of the reserved water rights for each Indian reservation and, also on a case-by-case basis, whether groundwater actually was intended and is needed to satisfy those particular rights.

Under 28 U.S.C. § 1257(a), the Court may review only "[f]inal judgments or decrees rendered by the highest court of a State." The Arizona Supreme Court's ruling in this case plainly was "interlocutory," and is so conceded by the petitioners in No. 99-1388.[5] Phelps Dodge Pet. at 9. The Court, therefore, does not have jurisdiction to entertain the petitions unless the otherwise interlocutory holding of the court below somehow fits within the limited category of cases where section 1257(a) finality has been found even though further proceedings in the lower courts are contemplated. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-79 (1988). *But see Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (review in the absence of a final judgment without any adverse effect upon important federal interests would permit the "exception to swallow the rule"). The finality rule with respect to review of state court proceedings is, of course, based upon sound principles of federalism. *See, e.g., North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159 (1973) (the finality rule "limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs"); ROBERT L. STERN, *ET AL.*, *SUPREME COURT PRACTICE* 95 (7th Ed. 1993). As is next demonstrated, the decision of the Arizona Supreme Court abjectly fails the finality test.

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[5] The Salt River Project petitioners in No. 99-1389 do not discuss the jurisdiction of the Court.

B. The exceptions to the final judgment rule set forth in *Cox Broadcasting* are not applicable where significant federal questions remain unanswered.

In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), the Court set forth four categories of cases involving 28 U.S.C. § 1257(a) or its predecessors where, in a departure from the "requirement of finality," this Court has reviewed interlocutory decisions "without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The Court further pointed out, however, that "[i]n most, if not all, of the cases in these categories, these additional [state court] *proceedings would not require the decision of other federal questions* that might also require review by the Court at a later date." *Id.* (emphasis added) (footnote omitted); *accord Flynt v. Ohio*, 451 U.S. at 621. The comprehensive water rights adjudication proceedings from which the decision below arises still involve fundamental and decisive unresolved questions of federal law, such as the interpretation of federal treaties, statutes and executive orders to determine what water rights were intended to be reserved when various Indian reservations were established. These significant unresolved federal questions, standing alone, should preclude piecemeal review of an Arizona Supreme Court decision which deals with only part of the case. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945) ("Of course, where the remaining litigation may raise other Federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews."); *North Dakota Pharmacy Bd.*, 414 U.S. at 159 (the finality rule "avoids piecemeal review by federal courts of state court decisions").

In any event, the decision below does not fit within any of the four exceptions to the final judgment rule described in

Cox Broadcasting. The first category, for example, covers cases where "the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Here in the proceedings below, virtually all the basic legal and factual issues have not yet been reached, much less conclusively decided.[6] In addition to the matters of treaty and statutory interpretation mentioned above, the Arizona Supreme Court has listed for future briefing and argument the following critical question of federal law independent of the groundwater issue: "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" App. A8; App. B2. In short, the ultimate result below hardly can be classed as preordained or free of other federal issues. *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120 (1981).

The second *Cox Broadcasting* category includes cases in which the federal issue "will survive and require decision regardless of the outcome of further state court proceedings." 420 U.S. at 480 (citing *Radio Station WOW* and *Brady v. Maryland*, 373 U.S. 83 (1963)). The cases cited by the Court in *Cox Broadcasting* as falling into this category all are distinguishable since, unlike this case, none involved outstanding federal issues in addition to the question actually decided by the highest court of the State.[7] Moreover, whether

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[6] In a filing before the Superior Court in the Little Colorado River adjudication (attached as Exhibit A), the State of Arizona, in requesting a pretrial conference, declared as recently as April 17, 2000: "The State of Arizona agrees [with Phelps Dodge and others] that the litigation of tribal claims and objections to tribal claims will require this Court to address complex legal and factual issues." Exhibit A at 1.

[7] In addition to *Radio Station WOW* and *Brady*, the Court in *Cox Broadcasting* relied upon *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U.S. 362 (1914), and *Forgay v. Conrad*, 6 (How.) U.S. 201 (1848). As is pointed out in *Radio Station WOW*, "the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable

the issue decided by the Arizona Supreme Court will survive and need to be decided by this Court is directly related to the outcome of further state court proceedings—a result which is currently unknown and unknowable. That outcome will depend upon: (1) whether the state courts construe the treaties, statutes or executive orders establishing a particular Indian reservation as having reserved groundwater; and (2) if so, whether any particular third party, including petitioners, is hurt by recognition of such reserved water rights. After all, as petitioners so frequently point out, Phelps Dodge Pet. at 24; Salt River Pet. at 5-6, 22, an earlier user of groundwater has no cause of action or other claim under Arizona law against a subsequent user, including an Indian tribe, who makes "reasonable and beneficial" use of the water underneath his or her own lands.[8] ARIZ. REV. STAT. § 45-453. In other words, the one federal issue among many decided, or to be decided, by the Arizona Supreme Court, on which petitioners seek review, may not survive further lower court proceedings and thus may never need to be decided by this Court.

The third *Cox Broadcasting* exception covers cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had,

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and is to be deemed dissociated from a provision for an accounting." 326 U.S. at 126, circumstances that do not exist in the instant case.

[8] Petitioners potentially could be adversely affected if their use of groundwater were curtailed to protect reserved water rights—a principle of federal law which the Arizona Supreme Court also recognized. App. A25-A28 (Question 5). Petitioners, however, have declined to seek review of that portion of the Arizona court's holding, Phelps Dodge Pet. at 9 n.4; Salt River Pet. at 9 n.7, perhaps in view of this Court's ruling in *Cappaert v. United States*, 426 U.S. 128 (1976) (pumping of underground water may be enjoined to protect prior federal reserved rights to surface water).

whatever the ultimate outcome of the case." 420 U.S. at 481. In the cases cited by the Court as examples of this category,[9] review after further lower court proceedings would have been precluded because, if the petitioner won below, the federal issue might become moot or the matter be decided on state law grounds, and if the petitioner again lost, any appeal would be barred for reasons of state law. *Id.* That is not this case. We are not aware of any state law, rule or other circumstance, and petitioners cite none, which would prevent them, if adversely affected, from preserving the federal issue decided by the Arizona Supreme Court for review by this Court after a final decree is entered. As the Court pointed out in *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976),

> questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are *federal questions* which, if preserved, can be reviewed [by the Supreme Court] *after final judgment* by the Colorado court.

Id. at 813 (quoting *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971)) (emphasis added).

The fourth category of interlocutory decisions treated as final, according to *Cox Broadcasting*, and the sole exception upon which petitioners rely, Phelps Dodge Pet. at 10-11, consists of cases (1) where "the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issues by the Court" and (2) "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83. This case does not meet either of these conditions. Since the critical issues

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[9] *California v. Stewart*, 384 U.S. 436 (1966); *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973).

here *sub judice*—the nature of federal reserved water rights and the intent expressed in the government documents reserving such water rights—are all exclusively federal questions, petitioners cannot possibly prevail on non-federal grounds. Similarly, since the underlying cause of action involves, *inter alia*, the extent of federal reserved water rights, of which groundwater is only a part, a decision by this Court on the question presented for review cannot possibly preclude further litigation.

In order to justify exercise of this Court's jurisdiction, petitioners rip from context the Court's words in *Cox Broadcasting* that review may be granted "if a refusal immediately to review the state court decision might seriously erode federal policy." Phelps Dodge Pet. at 10 (citing 420 U.S. at 483). Petitioners carefully omit the Court's preceding statement—that the alleged erosion of federal policy comes into consideration *only* if the above-described two conditions are met, *i.e.*, only "[i]n these circumstances" may review be granted. 420 U.S. at 483. As demonstrated above, particularly given the continued existence of unresolved federal questions, the predicate "circumstances" do not exist in this case, so the matter of federal policy should never be reached.

Even assuming, *arguendo*, that federal policy implications might be relevant to an analysis of finality, petitioners still fail to show any federal policy that is placed in jeopardy by the decision below. Indeed, what really troubles petitioners is that the Arizona courts have upheld federal policy. Specifically, the Arizona Supreme Court's holding, rather than eroding federal policy, in fact protects from erosion the federal reserved water rights doctrine set forth by this Court in *Winters* and *Cappaert*.[10] In addition, petitioners' argu-

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[10] As the Court observed in *Flynt v. Ohio*:

> The cases which the Cox opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional

ment that "state law . . . should be adopted as the rule of decision for determining rights under federal law," Phelps Dodge Pet. at 11, repeatedly has been rejected by this Court in federal reserved water rights cases. *See Winters*, 207 U.S. at 577-78; *Cappaert*, 426 U.S. at 145-46; *Arizona v. California*, 373 U.S. at 597-602; *see also United States v. New Mexico*, 438 U.S. 696, 715 (1978) ("the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas"); *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 571 (state courts must apply federal substantive law to measure federal rights in state water rights adjudication). Stated quite simply, the applicable federal policies are not what petitioners say they are, and none is eroded by the decision below.

The fact that the Court has reviewed decisions of state supreme courts in federal reserved water rights litigation under other circumstances is irrelevant. Of the two cases cited by petitioners, Phelps Dodge Pet. at 13, the Court in *United States v. New Mexico*, had under review a final judgment defining the water rights of a specific federal reservation, 438 U.S. at 698, and in *Wyoming v. United States*, 492 U.S. 406 (1989), a case where no opinion was rendered, the Court had under consideration a decision where all the federal issues, including quantification of the Tribes' water rights, had been tried and determined. *See In re the General Stream Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 85 (Wyo. 1988). These cases and, presumably, any similar water rights decisions thus involved final judgments or decrees or fell within one of the *Cox Broadcasting* exceptions. The decision below does not.

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policies which would have been undermined by the continuation of the litigation in the state courts.

451 U.S. at 622.

II THE DECISION OF THE ARIZONA SUPREME COURT IS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT AND THUS REQUIRES NO REVIEW.

A. The court below correctly determined that the nature and extent of reserved water rights, including rights to groundwater, depend upon the purposes for which each federal reservation was created.

This Court repeatedly has ruled that the scope of federal reserved water rights depends upon the intent of the parties when each specific reservation was established. *Winters v. United States*, 207 U.S. at 575 ("The case, as we view it, turns on the agreement of May, 1888 [25 Stat. 113], resulting in the creation of the Fort Belknap Reservation."); *Arizona v. California*, 373 U.S. at 597 ("under our view, the Indian claims here [to water] are governed by the statutes and Executive Orders creating the reservations"); *Cappaert v. United States*, 426 U.S. at 139 ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water."). In short, the nature and extent of federal reserved water rights cannot be ascertained without first knowing the purpose for which the reservation was created.

The decision of the Arizona Supreme Court in this case is wholly consistent with the above-cited holdings of the Court. Thus, the court below concluded that, in federal reserved water rights cases, the trial court must determine the purpose of the reservation and then determine the waters necessary to accomplish that purpose—both "fact-intensive inquiries that must be made on a reservation-by-reservation basis." App. A24 (citing *United States v. New Mexico*, 438 U.S. at 700). Given the complete absence of trial court findings or any factual record on the subject, Phelps Dodge Pet. at 14, the

Arizona Supreme Court refused to decide that any particular reservation has a reserved right to groundwater. Rather the court held only that a reservation *might have* such a right if the facts and circumstances under which it was created ultimately so indicate. App. A24. On this point the court below further declared that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation," *id.*, *i.e.*, the Government may have intended to reserve groundwater because the purpose of the reservation would otherwise be frustrated. There is nothing new in that analytic approach to application of the reserved water rights doctrine.

Petitioners assert as a basis for review, however, the proposition that the Arizona Supreme Court's decision that reserved waters may include groundwater is improper because it was rendered "in the abstract" and "without aid of a record establishing the purposes of any federal reservation." Phelps Dodge Pet. at 14. This argument is self-defeating. Petitioners, in seeking review at an interlocutory stage of the proceedings, are asking this Court to take exactly the same action for which they fault the Arizona court—in short, to rule that groundwater may *not* be included within a reserved water right, also without aid of a factual record establishing the purposes of any federal reservation or the water supplies available to the reservation. Petitioners would have the Court establish a *per se* rule negating federal rights to groundwater, regardless of the underlying facts.

On the contrary, as petitioners acknowledge, this Court has determined reserved water rights "only after careful review of the underlying legal instruments by which the reservation in question was created." Phelps Dodge Pet. at 14-15. That is exactly the inquiry the court below directed. App. A24. Petitioners' argument thus shows plainly that their request for review at this time not only is premature, but also conflicts

with the orderly determination of reserved water rights previously sanctioned by the Court.

B. The Arizona Supreme Court correctly decided that federal reserved water rights in Arizona as elsewhere must be determined in accordance with federal and not state law.

In *Winters v. United States*, the Court recognized and protected a reserved water right under federal law that was independent of and paramount to any water right acquired under state law after the federal reservation had been established. The Court repeatedly has ruled since that 1908 decision that the nature and extent of federal reserved water rights are governed by federal and not state law. *See, e.g., Cappaert v. United States*, 426 U.S. at 145 (the "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation"); *United States v. New Mexico*, 438 U.S. at 715 ("the 'reserved water rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas."). Indeed, in the direct judicial antecedent to the instant proceedings, the Court declared that in state water adjudications, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 571.

The Arizona Supreme Court in this case has simply followed that unbroken line of decisions. App. A15. Petitioners seek to distinguish these past holdings, however, by claiming that the Court there refused to apply state laws regulating the appropriation of water, but the Arizona law regulating groundwater is different. Phelps Dodge Pet. at 16-17, 24-25; Salt River Pet. at 20. Instead of first in time, first in right, as under the appropriation laws, the Arizona groundwater statute is said to permit all landowners to use groundwater underlying their lands for any reasonable purpose regardless of priority in time of use. Phelps Dodge Pet. at 24. Since federal

agencies and Indian tribes can pump groundwater pursuant to state law, petitioners allege, the court below should have invoked state law to define the federal right.

In addition to conflicting with 92 years of contrary precedents in this Court expressly holding that federal and not state law governs reserved water rights,[11] petitioners' argument that state law would protect reserved rights is demonstrably untenable in its own context. Specifically, as the Arizona Supreme Court recognized, "[a] theoretically equal right to pump groundwater, in contrast to a *reserved* right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers," App. A23, emphasis in original, a situation that already has occurred in the Lower Gila River watershed. *Id.* at A23-24. Moreover, if state law governs federally protected uses of groundwater, the State of Arizona—which is not known for being friendly to federal and Indian tribal water rights[12]—could amend state groundwater law to include federal and Indian reservations within "active management areas" or "irrigation non-expansion areas," and thus prohibit new uses of groundwater regardless of the purposes for which such reservations were created and their actual water needs. *See* Phelps Dodge Pet. at 25; Salt River Pet. at 5, n.3; State of Arizona Response at 6-8; *cf. Cappaert v. United States*, 426 U.S. at 136-138 (off-

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[11] State laws in general do not apply to Indian lands or property. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *Rice v. Olson*, 324 U.S. 786, 789 (1945)("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

[12] In 1995, Arizona enacted legislation to enlarge water rights acquired under state law at the expense of federal and Indian water rights, substantial portions of which the Arizona Supreme Court declared unconstitutional. *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999).

reservation pumping curtailed to protect a reserved surface water right). In short, Arizona groundwater law protects most existing uses—almost all now by non-Indians—but allows for prohibiting or sharply limiting new uses. State of Arizona Response at 5-8. Application of such a regulatory regime clearly would frustrate the purposes for which currently underdeveloped Indian reservations were established in circumstances where surface water supplies are inadequate. Petitioners' rationale (*i.e.*, even-handedness) for asking the Court to give primacy to Arizona's groundwater statutes, therefore, cannot survive even the most cursory scrutiny.

As previously noted, *supra* at section II.A., whether recognition of federal reserved water rights will affect current groundwater users, and also whether that effect will differ from the impact upon owners of appropriated water rights under state law, simply cannot be determined by this Court or any other court at this early date in the litigation in the absence of a record. Such determinations remain to be made—at least initially in the trial court. Petitioners' argument that the court below erred by failing to "integrate the disparate federal and state-law rights," Phelps Dodge Pet. at 17, with respect to groundwater thus is clearly incorrect. Petitioners never explain (nor could they) how the lower courts could "integrate" state law rights and federal reserved water rights when the latter rights have not yet been identified. Petitioners' additional arguments about statewide water shortages and that "[g]roundwater is and will remain an important component of Arizona's mix of water resources," Salt River Pet. at 16, do demonstrate, on the other hand, the desirability if not the necessity of considering groundwater as part of any comprehensive adjudication of water rights in the arid Southwest. As the State of Arizona points out, "groundwater 'is the primary water supply in most areas of the State,' " State Response in Support of Petitions at 3, a condition surely true also for Indian reservations.

C. The cases cited by petitioners as supporting application of state law are inapposite.

Petitioners rely upon two cases, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), in support of their argument that the Arizona Supreme Court erred in failing to adopt state law as the measure of the applicable federal law. Phelps Dodge Pet. at 17-22; Salt River Pet. at 23. Neither case supports adopting state law to govern reserved water rights.

Kimbell Foods sets forth in a commercial context certain general principles as to when federal law questions should be decided on the basis of state law rules. 440 U.S. at 728-29. This Court, however, long ago decided that federal reserved water rights questions are an exception and are to be decided without regard to state law. *United States v. New Mexico*, 438 U.S. at 715; *see also Winters v. United States*, 207 U.S. at 577-78. Moreover, this case does not meet the *Kimbell Foods* test for applying state law on two counts: (1) federal reserved water rights "by their nature are and must be uniform in character throughout the Nation;" and (2) "application of state law would frustrate specific objectives of the federal" reservations. *Id.* at 728. Indeed, were the *Winters* doctrine otherwise, states would be free to enact ostensibly non-discriminatory legislation which actually is aimed at defeating federal and Indian tribal water rights, as Arizona already has attempted during the course of these proceedings. App. A9 (citing *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999) (holding retroactive changes in state water law unconstitutional in substantial part)); *see supra* at 19.

Wilson v. Omaha Indian Tribe is also not a reserved water rights case. There, in a title dispute involving an Indian reservation, the Court had under consideration whether state law relating to accretion/avulsion should be adopted as the

governing federal law. The land in question had moved from the west to the east side of the river and thus from Nebraska to Iowa, but the major federal concern over the boundary between these states already had been resolved by interstate compact. Under these unique circumstances, the Court found no need for a nationwide rule or that application of state law would adversely affect any major federal interest, particularly since "[o]n some occasions, Indian tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is likely on other occasions that the tribe will stand to gain." 442 U.S. at 673. This case, on the other hand, is not so devoid of an adverse impact upon significant federal rights.[13] Plainly this Court cannot conclude in the absence of any record that application of state groundwater law principles would have a neutral, rather than unfavorable effect, on federal reserved rights on Indian reservations in Arizona.

III. THE DECISION BELOW HAS NO NATIONAL SIGNIFICANCE AND NO IMMEDIATE IMPACT EVEN IN ARIZONA.

A. Arizona's exclusion of groundwater from the law of prior appropriation is not generally the rule in other states.

Petitioners focus on Arizona's legal bifurcation of surface and groundwater under which reasonable use, rather than the doctrine of prior appropriation, governs the taking of groundwater. Phelps Dodge Pet. at 24-26; Salt River Pet. at 23-28. Under the current Arizona system, landowners may pump "percolating" groundwater on their lands limited only by the doctrine of reasonable use. In contrast to the prior

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[13] After *Wilson*, the Court rejected borrowing a state statute of limitations as federal law where that would foreclose a tribal claim to land because such action "would be inconsistent with federal policy." *Oneida County v. Oneida Indian Nation*, 470 U.S. at 241.

appropriation doctrine, no priority attaches to such uses under Arizona law and, unless the pumpers are located in an "active management" or "irrigation non-expansion" area subject to certain statutory restraints against new uses, they are free to pump water beneath their land regardless of the impact that pumping may have upon either surface or groundwater supplies used by other persons. Phelps Dodge Pet. at 24-25; Salt River Pet. at 5-6. Petitioners contend that because Arizona law does not generally inhibit the use of groundwater by a landowner, state law is sufficient to allow an Indian tribe in Arizona to use groundwater when that resource is needed to fulfill the purposes of its reservation. Phelps Dodge Pet. at 25; Salt River Pet. at 24. Petitioners, of course, do not discuss what the impact on reserved water rights might be if Arizona were to adopt a "non-discriminatory" amendment to its Groundwater Code to prohibit or drastically limit all new pumping of groundwater, which is what most Indian uses will be.

Petitioners' arguments for review of the Arizona Supreme Court's decision turn in large part on the hydrologically-erroneous provisions of Arizona law which declare that percolating groundwater is distinct from surface water. *See In re the General Adjudication of All Rights to Use Water in the Gila River System*, 857 P.2d 1236, 1243 (Ariz. 1993); App. A11 (describing the assumptions of Arizona groundwater law as an "artifice"). These arguments ignore the fact that, unlike Arizona, virtually all other western states do *not* exclude groundwater from the application of the prior appropriation doctrine because they do not make the same artificial distinction between surface and groundwater. Indeed, of the ten western states listed by petitioners as having substantial federal and tribal lands, only California refuses to apply the doctrine of prior appropriation to groundwater. Salt River Pet. at 13 n.10; *compare* State Response in Support of Petitions at 17 n.20. As a result, the supposed ready access to groundwater under Arizona law that

the petitioners tout as sufficient to meet the needs of the Tribes is simply not a part of the law in other western states. Given Arizona's unique groundwater rules, this case has no national significance.

The difficulties petitioners claim may confront the adjudication court in integrating the right to use groundwater under federal law with the uncurtailed pumping of groundwater allowed under Arizona law are equally insubstantial. No doubt, as the state court recognized, that task will require thoughtful consideration by the parties and the courts. App. A28-29. But such problems are hardly insurmountable. Whatever doctrine or doctrines apply to the use of groundwater, the integration of state and federal rights inevitably will closely parallel the similar efforts that must be undertaken with regard to surface water—a task which this Court has found the state courts fully competent to handle. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. at 570. In any event, the rights can only be "integrated" after they have been determined, a task that remains to be done.

To summarize, petitioners' challenge to the decision below rests in significant part on the unique provisions of Arizona groundwater law which allow uninhibited pumping of the resource outside of statutorily restricted areas, but which stand apart from the law of virtually all other western states. Thus, neither the so-called advantage of Arizona law that enables Indian tribes to pump water on their reservations regardless of the extent of pre-existing demand on the underlying aquifer nor any difficulties that may arise in melding federal rights with otherwise unregulated pumping are present in those other states. Accordingly, the interlocutory decision of the Arizona Supreme Court is a poor vehicle for this Court to determine whether the purposes of the Indian reservations in question require the use of groundwater as well as surface water.

B. A ruling by this Court will not eliminate groundwater users from the litigation.

In an effort to inflate the importance of the question presented, petitioners argue that, absent this Court's overruling the Arizona Supreme Court, "thousands of claimants in the Gila River Adjudication will be forced to endure long and complex litigation." Phelps Dodge Pet. at 12 (internal quotation omitted). This plea is misguided. Assuming, *arguendo*, that the decision below were reversed, the same thousands of claimants, presumably groundwater users, still would have to remain in the litigation because their pumping might have to be curtailed to protect the federal reserved surface water rights that are decreed. *Cappaert v. United States*, 426 U.S. 128 (1976), plainly holds that surface water rights reserved under federal law are entitled to protection against groundwater pumpers exercising after-acquired rights pursuant to state law. Unfortunately, the very concept of a comprehensive stream adjudication, virtually by definition, inexorably requires hundreds or thousands of parties to participate, and this litigation will be long and complex with or without consideration of groundwater to satisfy federal reserved rights.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE WYOMING SUPREME COURT'S DECISION IN *BIG HORN*.

Petitioners assert that the Arizona Supreme Court's decision in this case conflicts with the decision of the Wyoming Supreme Court in *In re the General Stream Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion by an equally divided court*, 492 U.S. 406 (1989). Petitioners' claim of conflict with *Big Horn* is mistaken and provides no basis for review by this Court.

In *Big Horn*, the Wyoming court analyzed the Shoshone and Arapaho Tribes' water rights claims in light of the purposes for which the Wind River Reservation had been established. The reservation in fact had been selected because it lay in the Big Horn River valley with fertile land and an abundant surface water supply. *United States v. Mazurie*, 419 U.S. 544, 546 (1975). The court determined that the sole purpose of the reservation was for agriculture, and that its purposes did not include mineral and industrial development. 753 P.2d. at 98. The Tribes' claims for municipal, domestic and commercial uses, for which they had sought a separate water right, were further determined to be subsumed within the Tribes' agricultural water right. *Id.* at 99. In substance, the court determined that the purposes of the Wind River Reservation were satisfied entirely by the Tribes' surface water right for agriculture, an amount in excess of 500,000 acre-feet.[14]

Only after its finding that the reservation's water rights were limited to agricultural uses did the Wyoming Supreme Court address the application of the reserved water rights doctrine to groundwater. The court recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 99 (citing *Tweedy v. Texas Company*, 286 F. Supp. 383, 385 (D. Mont. 1968)("whether the [necessary] waters were found on the surface of the land or under it should make no difference")). Nonetheless, the Wyoming court concluded, without analysis or explanation,[15]

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[14] The Arizona courts in this case, of course, have not made any comparable study of the purposes or water needs of any Indian reservations.

[15] The *Big Horn* court did note that "not a single case applying the reserved water doctrine to groundwater is cited to us," 753 P.2d at 99, but then cites *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974),

that "the reserved water doctrine does not extend to groundwater." *Id.* at 100. Given the facts of the case, where the agricultural purposes of the Wind River Reservation could be wholly satisfied by available surface water, this conclusion was *dicta*.

The Arizona Supreme Court, on the other hand, was "fairly confronted with the issue." App. A17. After careful analysis of the relevant judicial precedents and Arizona statutory law, the court affirmed the trial court's determination that "the federal reserved water right doctrine applies not only to surface water but to groundwater." *Id.* at A24. The Arizona court pointed out, however, that a final determination of reserved rights to water requires "fact-intensive inquiries that must be made on a reservation-by-reservation basis" and that groundwater, if an intent to reserve it is found, still will be limited to the amount necessary if "other waters are inadequate to accomplish the purpose of a reservation." The "fact-intensive inquiries" mandated by the Arizona court, of course, are the same as and thus consistent with the reservation purposes analysis made by the Wyoming court. Accordingly, there is no conflict between the basic approaches to reserved water rights utilized by the two state courts, and no basis for review by this Court at this time.

Finally, petitioners' claim of "uncertainty" caused by the Arizona court's decision is also mistaken. *See* Phelps Dodge Pet. at 28-29; Salt River Pet. at 11-13 (citing *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) (Rodeghiero, J., dissenting)). The existence of reserved water rights claims to groundwater creates no greater uncertainty than reserved rights claims to surface water. The petitioners' claim of uncertainty is nothing more than a retread of the age-old argument raised against the existence of

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which did so hold prior to this Court's decision on review reserving judgment on the question. *Cappaert v. United States*, 426 U.S. at 143.

reserved water rights *in toto*. Such arguments have been made to no avail at least since this Court first announced the Indian reserved rights doctrine in *Winters v. United States*. Indeed, the non-Indians in *Winters* argued that "if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, and said communities will be broken up, and the purpose and object of the government in opening said lands for settlement will be wholly defeated." 207 U.S. at 570. The argument was not accepted there nor in any subsequent cases. *See, e.g., Arizona v. California*, 373 U.S. at 599 ("Much the same argument made to us was made in Winters to persuade the Court to hold that Congress had created an Indian Reservation without intending to reserve waters necessary to make the reservation livable."). Likewise, petitioners' claim of uncertainty here presents no basis for this Court's review of the decision below.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Briefs in Opposition of other respondents, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF APACHE

No. 6417

IN RE THE GENERAL ADJUDICATION OF
ALL RIGHTS TO USE WATER IN THE LITTLE
COLORADO RIVER SYSTEM AND SOURCE

STATE OF ARIZONA'S JOINDER IN MOTION TO SET PRETRIAL CONFERENCE

DATE OF FILING: APRIL 17, 2000

The State of Arizona joins in the Motion to Set Pretrial Conference filed by Claimants Arizona Public Service Company (APS), Phelps Dodge Corporation (Phelps Dodge), and Aztec Land and Cattle Company, (Aztec) and urges this Court to grant that Motion.

The State of Arizona agrees that the litigation of tribal claims and objections to tribal claims will require this court to address complex legal and factual issues. The early resolution of certain threshold issues and the appropriate phasing of the litigation may greatly expedite the process, reduce the costs to the litigants, and promote the efficient use of scarce judicial resources. A pretrial conference is the correct forum in which to establish appropriate pretrial procedures. The State of Arizona therefore urges this Court to grant the Motion to Set Pretrial Conference

RESPECTFULLY SUBMITTED this 20th day of April, 2000.

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Supreme Court, U.S.
FILED
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CLERK

No. 99-1388

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION, ARIZONA PUBLIC SERVICE COMPANY, GILA VALLEY IRRIGATION DISTRICT, AND FRANKLIN IRRIGATION DISTRICT,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law?

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SUPPLEMENTAL STATUTORY PROVISIONS INVOLVED IN THE CASE

Arizona Revised Statutes (A.R.S.) § 45-251 provides, in pertinent part:

> 1. "General adjudication" means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source.
>
> * * *
>
> 3. "Person" means an individual, a partnership, a corporation, a municipal corporation, the state of Arizona or any political subdivision, the United States of America, an Indian tribe or a community or any other legal entity, public or private.
>
> * * *
>
> 7. "River system and source" means all water appropriable under § 45-141 and all water subject to claims based upon federal law.

STATEMENT OF THE CASE

I. HISTORY OF ARIZONA GROUNDWATER LAW

In *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), the Arizona Supreme Court addressed the issue of underground water. The Arizona Court drew a distinction between subflow, which it held to be appropriable under Arizona's prior appropriation laws, and percolating water, which it held not to be appropriable. The Court

did not, however, provide a definition of or distinction between subflow and percolating waters.

The Arizona Court considered and rejected one set of definitions of subflow and percolating water in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) (*"Gila River II"*). In that decision, the Arizona Court acknowledged that this bifurcated system of water rights – surface vs. groundwater – was not hydrologically sound.

> As scientific knowledge progressed, most states revised their water laws to provide for unitary management of hydraulically connected underground and surface water. Arizona, however, did not, and continues to adhere to a bifurcated system of water rights, with compelling implications for general stream adjudications.

175 Ariz. at 386, 857 P.2d at 1240. The Arizona Court went on to note: "[W]e recognize that the line between surface and groundwater drawn by the Southwest Cotton court and reaffirmed by this court today is, to some extent, artificial and fluid." 175 Ariz. at 392, 857 P.2d at 1246.

The terms *subflow* and *percolating water*, for purposes of Arizona's bifurcated system, were again defined by the trial court and have again been taken to the Arizona Supreme Court on interlocutory review. The Arizona Court has received briefs and, in December of 1999, heard oral arguments.

In 1948, the Arizona Legislature adopted the Groundwater Act, which authorized the creation of critical

groundwater areas. In 1952, in *Bristor v. Cheatham*, 73 Ariz. 228, 240 P.2d 185 (*"Bristor I"*), the Arizona Supreme Court reversed *Southwest Cotton* and determined that percolating groundwater was appropriable. Upon rehearing, following a change in the composition of the court, the Arizona Supreme Court reversed *Bristor I* and readopted the *Southwest Cotton* rule on non-appropriation of percolating groundwater. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953) (*"Bristor II"*).

In 1980, the Arizona Legislature enacted the Groundwater Management Act and repealed the 1948 Groundwater Act. The Groundwater Management Act created active management areas ("AMAs") and irrigation non-expansion areas. The 1980 Groundwater Management Act was ruled constitutional in *Town of Chino Valley v. City of Phoenix*, 131 Ariz. 78, 638 P.2d 1324 (1981) (*"Chino Valley II"*). Therein, the Arizona Supreme Court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." 131 Ariz. at 82, 638 P.2d at 1328.

In *Cherry v. Steiner*, 543 F. Supp. 1270, 1280 (1982), the United States District court examined the extent of the Groundwater Management Act's coverage.

> It established four AMA's, which account for 69 percent of the State's groundwater overdraft and 80 percent of the State's population. The three AMA's with safe yield goals account for 45 percent of the overdraft and 77 percent of the population in Arizona. The Arizona Department of Economic Security has forecasted that the

State's population will explode most profoundly in the area encompassed by the Phoenix, Tucson and Prescott AMA's.

II. HISTORY OF THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

In 1919, the Arizona Legislature adopted a procedure for the determination of conflicting water rights, which was amended in 1928 and 1939. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979). That procedure was conducted before the Arizona State Land Department in an administrative hearing, was limited to prior appropriation water rights, involved the rights of streams or water supplies but not entire river systems and sources, and did not address federal reserved rights.

General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow, 27 Ariz. Law Rev. 709 n. 2, 1985, set forth the early history of Arizona's general water adjudications:

> On April 26, 1974, the Salt River Valley Water Users' Association (SRVWUA), invoking Arizona's statutory stream adjudication procedure, filed a petition with the Arizona State Land Department to determine conflicting rights to the use of water in the Salt River above Granite Reef Dam, east of Phoenix and excluding the Verde River. SRVWUA filed a similar petition for the Verde River and its tributaries on February 28, 1976. On February 17, 1978, Phelps Dodge Corporation filed two petitions with the State Land Department: one determining the conflicting rights to the Gila River, and the other

> determining the conflicting rights to the Little Colorado River.

The Arizona Supreme Court further described the history of these general water adjudications in *United States v. Superior Court of Arizona*, 144 Ariz. 265, 270, 697 P.2d 658, 663 (1985):

> In 1979 the [Arizona State Land] Department advised various claimants of the pending petition and required that claims be filed pursuant to A.R.S. Section 45-232. Petitioners [San Carlos Apache Tribe, Tonto Apache Tribe, and the United States] were among the claimants so notified. Later that year several Indian tribes, including the petitioners, filed actions in the United States District Court for the District of Arizona, seeking a declaration of rights with respect to the issues raised in the proceeding before the Arizona State Land Department. Within two months after that filing, the state legislature repealed the former act (Sections 45-231 to 45-245) and replaced it with the present statute (article 6, Title 45, Arizona Revised Statutes, consisting of Sections 45-251 to 45-260 and entitled "General Adjudication of Water Rights").

A number of Arizona Indian Tribes brought actions in District Court, requesting relief from state administrative water adjudications. The parties to *In the Matter of the Determination of Conflicting Rights to the Use of Water From the Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), included the Salt River Valley Water Users' Association, the Phelps Dodge Corporation, the State of Arizona, the Gila River Indian Community, the San Carlos Apache Tribe, and numerous other Arizona Indian Tribes.

On January 18, 1980, the District Court remanded the actions to state court or dismissed them, without prejudice, based on the applicability of the McCarran Amendment. 43 United States Code (U.S.C.) § 666. The tribes had contended that the State adjudication was not a McCarran Amendment proceeding because the Arizona water rights determination law deliberately excluded non-Indian uses of percolating groundwater. After an analysis of the *Winters* Doctrine, *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), and the applicable Arizona state law, the District Court concluded:

> Section 45-251(5), Arizona Revised Statutes, which effectively sets forth the scope of the State proceedings, defines the phrase "river system and source" as "(A)ll water appropriable under (A.R.S.) Section 45-101 and all water subject to claims based upon federal law."
>
> Thus, the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law. The only water rights excluded from the State proceeding are those rights to percolating groundwater arising solely under existing Arizona case law.

484 F. Supp. at 784.

The District Court's decision was appealed to the Ninth Circuit Court of Appeals in *San Carlos Apache Tribe of Arizona v. State of Arizona*, 668 F.2d 1093 (1982). The Ninth Circuit reversed the District Court's decision based upon its determination that Arizona's Enabling Act prohibited jurisdiction over Indians in State water adjudications, the McCarran Act not withstanding. Other issues,

including adjudication of groundwater claims, were not decided.

The Ninth Circuit decision was appealed to this Court in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201, 7 L.Ed. 2d 837 (1983). This Court reversed and remanded the case indicating that, because of the unique nature of water rights adjudications and the uniqueness of the McCarran Amendment, it had been proper for the District Court to defer to the state court proceedings.

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source has now been in litigation for over twenty years. The current opinion, 989 P.2d 739 (1999) (*"Gila River III"*), reflects the sixth appearance of this general stream adjudication before the Arizona Supreme Court. In this action, the Arizona Court answered two interlocutory questions:

> Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law? (Interlocutory Issue 4)
>
> Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights? (Interlocutory Issue 5)

The Arizona Supreme Court answered both questions affirmatively. No petition for a writ of certiorari was taken as to Interlocutory Issue 5.

ARGUMENT:

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI. CERTIORARI SHOULD BE DENIED.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion," and a petition for certiorari will be granted only for compelling reasons. Rule 10, Rules of the Supreme Court of the United States. There are no compelling reasons for the Court to grant this Petition.

I. THERE IS NO SUBSTANTIAL OR IMPORTANT FEDERAL QUESTION THAT MUST BE ANSWERED BY THIS COURT.

Over the years, this Court has used a number of phrases to describe its criteria for accepting a petition for a writ of certiorari. Whether the Court requires "special and important reasons," that the issue be "substantial in character," that the issue involve an "important federal question," or that the petition contain a "compelling reason," the rationale is the same – the Court will not use its limited resources to make determinations that do not have a significant and material impact.

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . 'Special important reasons' imply a reach to a problem beyond the academic or the episodic.

* * *

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 79, 75 S. Ct. 614, 616, 619-620, 99 L. Ed. 897 (1955).

This Petition for a Writ of Certiorari does not involve an issue of importance to the nation as a whole, to other state or federal courts, or to the vast majority of the citizens or water users in Arizona.

A. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, TURNS ON THE COURT'S INTERPRETATION OF UNIQUE ARIZONA WATER LAW AND THE PETITION RAISES NO ISSUE OF NATIONAL IMPORTANCE.

Water law varies widely from state to state – with individual peculiarities depending on the hydrology, geology, water needs, and the legal and hydrologic history of the particular state. Eastern and midwestern states tend to use various theories of riparian law. Western states tend to employ various theories of prior appropriation law. A number of states utilize a combination of riparian and prior appropriation water law principles. Individual states have detailed statutes or common law rules dealing with surface water use, underground water

use, or combined water use. Each state has its own statutory or common law rules for dealing with disputes between competing water users.

"Conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies." *Gila River III*, 989 P.2d at 744. Arizona has not undertaken a unitary management of water supplies, and has a bifurcated system that divides water into appropriable water (surface water and underground water designated as subflow) and non-appropriable water (underground water designated as percolating water) that the Arizona Court acknowledges is "an artifice . . . that rests on a hydrological misconception." *Gila River III*, 989 P.2d at 743.

There is no validity to Petitioners' claim that the "[t]he opinion below, if adopted as precedent in other states, will result in conflicts with state laws governing allocation and management of groundwater throughout the United States." Petition, page 26. No other state has Arizona's unique blend of water laws – including prior appropriation, a bifurcated underground water system, and administrative regulation of some but not all percolating waters – and Arizona's specific statute dealing with general adjudications of water rights.

State courts recognize their own independence in making rulings concerning their distinctive state laws. As the Georgia Court of Appeals noted: "[T]he decisions of other jurisdictions are not binding on this Court and will be followed only when they are determined to be consistent with the orderly and fair development of the law of

this state." *State Farm Fire & Casualty Co. v. American Hardware Mutual Insurance Co.*, 224 Ga. App. 789, 792, 482 S.E.2d 714, 717 (1997).

The Arizona Supreme Court determination, as to Interlocutory Issue 4, was based on its detailed analysis of Arizona's general adjudication statutes and the interrelationship of that law to Arizona groundwater law. The Arizona Court wrote:

> The City of Phoenix argues that our general adjudication statute permits us to adjudicate federal water claims only to the extent that they are claims to water that is appropriable under state law, and, thus, that we lack jurisdiction to consider whether federal reserved rights extend to non-appropriable groundwater. We summarily reject this argument because it is contrary to the plain, conjunctive definitional language of A.R.S. § 45-251(4) and because such an interpretation would deprive this adjudication of the comprehensive quality that our general adjudication statute was intended to provide.

Gila River III, 989 P.2d at 744 n. 5.

The Arizona Supreme Court, in this and other rulings on the Gila River Adjudication, has studied the history of Arizona's statutes governing the general adjudication of water rights. Prior to 1979, Arizona had a statute for determination of conflicting water rights that was administrative rather than judicial, was limited to state prior appropriation rights, and did not consider federal rights. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979).

In 1979, a number of Indian tribes filed actions arguing, among other things, that the state system for determination of conflicting water rights did not comply with the McCarran Amendment because it did not provide for the adjudication of Indian rights to percolating groundwater. *See Granite Reef Dam,* 484 F. Supp. 778. Two months after the Indians brought these actions, the Arizona Legislature abolished its existing water rights determination process and adopted a totally new process that defined a general adjudication as a judicial determination of the rights of all persons (including Indian tribes) to use water in any river system and source. *See* A.R.S. § 45-251(1) and (3). The Arizona Legislature defined *river system and source* as "all water appropriable under § 45-141 and all water subject to claims based upon federal law." *See* A.R.S. § 45-251(7). Following the adoption of these statutes, the District Court either remanded the Indian cases back to state court, or dismissed them without prejudice, because "the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater)." *Granite Reef Dam,* 484 F. Supp. at 784.

The Arizona Supreme Court has correctly determined that the Arizona Legislature intended to include Indian water rights to percolating groundwater in its general water rights adjudication statutes.

> Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.

Johnson v. Frankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997).

The Arizona Court having interpreted the Arizona statutes as including federal rights to percolating groundwater, such "state interpretation is as though written into the ordinance itself." *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953). *See also Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978).

In *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967), this Court reviewed a specific California statute and stated:

> Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of s 26 and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discrimination to an unconstitutional degree. We accept this holding of the California Court.

Here, the Arizona Supreme Court, armed with knowledge of the facts and circumstances concerning Arizona's unique groundwater laws and unique general water rights adjudication statutes, recognized that Arizona's laws on percolating groundwater are hydrologically unsound. It further considered that the Arizona Legislature amended statutes in response to certain federal court claims concerning percolating groundwater and that, based on the statutes' adoption, the federal court claims were remanded or dismissed.

The Arizona Supreme Court recognizes that "blind devotion to federal interpretation is not required; we

need not follow the federal cases if we believe Arizona policy, practice, or case law requires a different result." *Richie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990). Yet, based upon its intricate knowledge of Arizona's unique laws and unique hydrology, the Arizona Court determined that the Arizona statutes give Arizona courts the jurisdiction to adjudicate the rights of Indian and other federal reservations to percolating groundwater. Pursuant to its reasoning in *Reitman*, this Court should refuse to grant this Petition for a Writ of Certiorari.

Because of the complex factual and legal history surrounding the determination as to Interlocutory Issue 4, this case does not present a good vehicle for this Court's review. First, neither the Petitioners, nor any other landowners/water users, have any "right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and the right of the owner of the overlying land is simply to the usufruct of the water." *Chino Valley II*, 131 Ariz. at 82, 638 P.2d at 1328. Thus, there is no need to consider any federal question because, under Arizona's local laws, Petitioners have no rights of ownership to the groundwater.

In addition, this case and this issue have been ongoing for over twenty years. Based on the actions filed in *Granite Reef Dam*, the Arizona Legislature completely altered its process for water rights determinations. Based on the Arizona Legislature's actions, the District Court remanded the Indian claims back to state court because "the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater)." 484 F. Supp. at 784. The Salt River Valley

Water Users' Association, Phelps Dodge Corporation, and the State of Arizona, as well as the Gila River Indian Community and the San Carlos Apache Tribe, were all parties to that litigation. Whether the decision is based on res judicata, collateral estoppel, judicial estoppel, law of the case, or simply a realization that this has been the state of the law on this issue in this proceeding for twenty years, there is no reason for this Court to accept jurisdiction now.

B. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, DOES NOT IMPACT ON THE VAST MAJORITY OF ARIZONA'S CITIZENS.

Petitioners are incorrect in their claim that the determination of Issue 4 will adversely affect millions of Arizona's citizens. In actuality, Issue 4 will have a very narrow impact. The Arizona Court noted, "some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping underground water." *Gila River III*, 989 P.2d at 746. The Arizona Court also wrote: "A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." 989 P.2d at 748. Thus, the federal reservations that *might* have water rights, under Issue 4, are those reservations that do not have surface water resources available to them and have not had surface resources in the past. The water basins subject to Issue 4 represent only 1% of Arizona's current population – less than 20,000 people – and only 2% of current water use. *See* Appendices A-3 and A-4.

The Arizona Court's decision, with regard to Interlocutory Issue 5, indicates that holders of federal reserved water rights enjoy greater protection from groundwater pumping than do holders of state law rights. As in this Court's decision in *Cappaert v. United States*, 426 U.S. 128, 143, 96 S. Ct. 2062, 2071, 48 L. Ed. 2d 523 (1976), Issue 5 deals with the ability of a federal reservation to "protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Appendices A-2 through A-4 are based on the Arizona Department of Water Resources' *Arizona Water Resources Assessment* of August 1994, which divided the state into a number of water basins based upon similar hydrology. Interlocutory Issue 5 will affect those water basins that contain a federal reservation that has or would have, but for upstream development and depletion, surface water resources available. Issue 5 will also affect water basins without a federal reservation but which are hydrologically connected to basins with a federal reservation. Issue 5 does have the potential to impact on lands that encompass 87% of the current water use and 97% of the current population of Arizona. Issue 5, however, was not appealed.

II. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

A. THE ARIZONA SUPREME COURT DECISION REQUIRES CONSIDERATION OF THE PURPOSES OF EACH SPECIFIC FEDERAL RESERVATION.

Petitioners are incorrect when they claim that Interlocutory Issue 4 conflicts with this Court's decision in

Winters v. United States, 207 U.S. 564, by finding a federal reserved right to groundwater without considering the purposes of any specific reservation. The Arizona Court unequivocally stated:

> We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Gila River III, 989 P.2d at 748.

B. THE ARIZONA SUPREME COURT DECISION COMPLIES WITH THE GUIDELINES OF *UNITED STATES v. KIMBELL FOODS.*

While Respondent does not believe that a *Kimbell Foods* analysis was necessary, the Arizona Supreme Court did not, as alleged by the Petitioners, fail to apply the test of *United States v. Kimbell Foods*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), when it made its analysis of the applicability of federal law to the rights of federal reservations to groundwater.

Kimbell Foods, 440 U.S. at 728, 99 S. Ct. at 1458, analyzed situations in which there is a need for a nationally uniform body of law. The Arizona Court specifically considered the issues discussed in *Kimbell Foods*, noting first that

> in order to adjudicate water rights based upon federal law, the Arizona courts must afford federal claimants the benefit, when state and federal law conflict, of federal substantive law. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).
>
> * * *
>
> [T]he Supreme Court has defined the reserved rights doctrine as an exception to Congress's deference to state water law. See United States v. New Mexico, 438 U.S. 696, 714, 98 S. Ct. 3012, 75 L. Ed. 2d 1052 (1978) . . . see also United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703, 19 S. Ct. 770, 43 L. Ed. 1136 (1899) (state law cannot be applied to destroy the federal government's right to water on its lands).

Gila River III, 989 P.2d at 744-745, 747.

Pursuant to *Kimbell Foods*, the Arizona Court considered whether the application of state law on percolating water would frustrate specific objectives of federal programs. The Arizona court stated:

> Where federal rights are at issue, a state court may adopt state law as the rule of decision if to do so would not frustrate or impair a federal purpose. See United States v. Kimbell Foods, Inc. 440 U.S. 715, 728-29, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). *Such is not the case here.* [Emphasis added.]

Gila River III, 989 P.2d at 747.

After extensive analysis of how groundwater pumping could interfere with the present and future water rights of Indian and other federal reservations, the Arizona Court determined:

> We therefore cannot conclude that deference to Arizona's law – and to the opportunity it extends all landowners to pump as much groundwater as they can reasonably use – would adequately serve to protect federal rights.

Gila River III, 989 P.2d at 748.

Kimbell Foods also discussed the need to consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 729, 99 S.Ct. at 1459. The Arizona Court considered this issue in detail:

> We recognize that our determination that reserved water rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses. State law parties may question how our present holding may be squared with our decision in Gila River II to retain Arizona's traditional bifurcation of the law of surface and groundwater. We are no less cognizant now than when we decided Gila River II that Arizona's agricultural, industrial, mining and urban interests have accommodated themselves to the framework of Southwest Cotton. [Citation omitted.] Yet there long has loomed the need – sometimes noted, sometimes wished away – for those same interests also to accommodate themselves to the water claims of the vast federal land holdings that surround them. [Citation omitted.] For state law purposes in Gila River II, we found reason to retain a bifurcated framework despite the hydrological misconceptions upon which it rested. But federal law does not permit us that option in deciding the extent of federal reserved rights. As Leshy

> and Belanger wrote in summary of Cappaert, "For federal law, the question is one of hydrology, not legal compartmentalization." 20 Ariz. St. L.J. at 734.
>
> We do not underestimate the burden that the State of Arizona will face in accommodating federal reserved water rights within its water resource management. Nor do we underestimate the burden that the trial court will face in adjudicating the extent and relative priority of such rights. Unless there is a comprehensive settlement, however, we must heed the lesson that "the best way out is always through." To solve the conflict and uncertainty that reserved rights engender, we must quantify them, for we may not ignore them.

Gila River III, 989 P.2d at 750.

The Arizona Court considered every element listed in *Kimbell Foods* and determined that the Arizona water rights adjudication statutes and Arizona water law made percolating groundwater available, when necessary, to fulfill federally reserved water rights.

C. THE ARIZONA SUPREME COURT DECISION INTEGRATES FEDERAL GROUNDWATER RIGHTS WITH EXISTING ARIZONA LAW.

Petitioners are incorrect in their claim that the Arizona Court's decision, as to Interlocutory Issue 4, fails to integrate federal groundwater rights with existing state groundwater law. The Arizona Court carefully and comprehensively integrated such groundwater rights; it simply did so in a manner disapproved of by the Petitioners.

The Arizona Court analyzed and rejected Petitioners' claim that Indian and other federal reserved water rights could be protected by nondiscriminatory access to a shared resource. The Arizona Court explained:

> A theoretically equal right to pump groundwater, in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers. Cf. Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 433 U.S. 658, 676 n. 22, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) ("[I]n light of the far superior numbers, capital resources, and technology of the non-Indians, the concept of the Indians' 'equal opportunity' to take advantage of a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all.")

Gila River III, 989 P.2d at 748.

The Arizona Court did not, as alleged by Petitioners, "guarantee a supply of water to federal reservations." Petition, page 17. The Arizona Court specifically stated:

> We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.

Gila River III, 989 P.2d at 748.

The Arizona Court also specifically stated that the right of a federal reservation to protect its groundwater from subsequent diversion is limited to "the extent such protection is necessary to fulfill its reserved right," and

found that the reserved right is "only that amount necessary to fulfill the purpose of the reservation, no more." *Gila River III*, 989 P.2d at 750.

Petitioners are also incorrect in their allegation that the Arizona court has extended the *Winters* Doctrine "on heretofore unrecognized principles of general federal common law." Petition, page 17. The Arizona Court applied the law, as it has existed for the last thirty years, and considered the uniform federal decisions recognizing a federally reserved water right to groundwater, including *Tweedy v. Texas Co.*, 786 F. Supp. 383 (D. Mont. 1968), *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660 (1986), and *United States v. Cappaert*, 508 F.2d 313 (9th Cir. 1974).

III. THERE IS NO REAL OR INTOLERABLE CONFLICT BETWEEN THE LOWER COURTS.

This Court has stated:

> Certiorari is granted . . . only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and . . . where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

National Labor Relations Board v. Pittsburgh S. S. Co., 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479 (1951).

A. THERE IS NO CONFLICT BETWEEN THE FEDERAL COURTS AND THE ARIZONA SUPREME COURT.

The decision of the Arizona Court, as to Interlocutory Issue 4, is consistent with all federal court decisions that have made a determination as to the applicability of the *Winters* or federal reserved water rights doctrine to groundwater. The District Court for the District of Montana examined this issue, in 1968, in *Tweedy v. Texas Company*, 786 F. Supp. at 385, stating:

> The Winters case dealt only with the surface rights, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

The Ninth Circuit Court of Appeals also examined this issue in *United States v. Cappaert*, 508 F.2d at 317:

> The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water rights, the reservation of water doctrine is not so limited.
>
> Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation. Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); Tweedy v.

> Texas Co., 286 F. Supp. 383 (D. Mont. 1968). In our view the United States may reserve not only surface water, but also underground water.

The United States Claims Court stated, in *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. at 699, that "[g]round water under the Gila River reservation impliedly was reserved for the Indians." The District court for the District of Washington held that *Winters* or federally reserved water rights "extend to groundwater as well as surface water." *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (1978). *See also State of New Mexico v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985). In *Granite Reef Dam*, the Arizona District Court also held that the *Winters* or federal reserved water rights doctrine extended to groundwater, and then made an independent finding that the determination of the rights of Indian and other federal reservations to percolating groundwater was required by the Arizona general water rights adjudication statutes.

Respondents found no federal case holding that the *Winters* doctrine does *not* extend to groundwater. Having cited no such case, it may be presumed that the Ninth Circuit Court of Appeals, the United States District Courts for the Districts of Montana, Washington, New Mexico and Arizona, the Arizona Supreme Court, and the Petitioners also found no such case.

Petitioners are incorrect in their claim that the Arizona Court has somehow created federal common law. The Arizona Supreme Court did not extend the *Winters* doctrine. Rather, the Arizona Court applied *Winters v. United States* in conformity with all of the existing federal court opinions that have examined the issue of reserved

rights to groundwater. The Arizona Court was correct in its determination as to Interlocutory Issue 4, under federal law as well as under the law of the State of Arizona.

B. THERE IS NO SIGNIFICANT CONFLICT BETWEEN STATE SUPREME COURTS.

The mere existence of a difference of opinion between two state supreme courts is not a sufficient reason for this Court to grant a petition for writ of certiorari. There is no significant or compelling conflict between the opinions of the Arizona Supreme Court and the Wyoming Supreme Court. There is no "real and embarrassing conflict of opinion and authority" that requires this Court's time and review. As noted earlier, state laws governing surface and underground waters, and judicial recognition of the right to use those waters, vary widely from state to state. The State of Wyoming does not have the same water laws as the State of Arizona. The fact that two state supreme courts, examining an issue in light of their own state laws, might come to differing conclusions is hardly a basis for intervention by this Court. Other state courts can and will take both the Arizona Court decision in *Gila River III*, and the Wyoming Court's decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76 (1988), for what they are – interesting opinions that may or may not be persuasive in light of the individual state's water laws. It would not be a proper utilization of this Court's resources to serve as a "super nanny" for the purpose of regulating state court interpretation of state water law.

Proof of the ability of the individual states to make an independent analysis, as to the issue of federal reserved water rights and groundwater, is found in the Arizona Court's determination of Interlocutory Issue 4. After carefully considering the Wyoming Court's decision in *Big Horn*, the Arizona Court wrote:

> [T]he Supreme Court of Wyoming recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." [Citation omitted.] Yet the court declined to find a reserved right to groundwater, stating in explanation only that it had been cited no previous decision which did so. [Citation omitted.]
>
> We can appreciate the hesitation of the Big Horn court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Gila River III, 989 P.2d at 745.

Petitioners are incorrect in their claim that the decision of the Supreme Court of Montana, in *Confederated Salish and Kootenai Tribes v. Clinch*, 56 Mont. 1356, 992 P.2d 244 (1999), demonstrates some "uncertainty" over the issue of reserved rights in groundwater. Quite the opposite, that opinion demonstrates that other state supreme courts are able to read and consider both the decision of the Supreme Court of Wyoming and the Supreme Court of Arizona and, then, to make their own independent decisions based on the unique facts and laws of their states. It is also important to note that the Montana District Court had already ruled, thirty years earlier, that

the reserved rights doctrine applied to underground as well as surface waters. *See Tweedy v. Texas Company*, 786 F. Supp. 383.

Justice Stevens, writing concerning the denial of certain petitions for writs of certiorari, advised:

> I believe that the further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have [come to differing conclusions concerning prosecutors' use of peremptory challenges]. . . . [M]y judgment is it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by the Court.

McCray v. New York, 461 U.S. 961, 961, 103 S. Ct. 2438, 2438-2439, 77 L. Ed. 2d 1322 (1983).

Here, there appears to be no federal court decision that differs from the Arizona Supreme Court's determination on Interlocutory Issue 4. The only differing state supreme court decision indicated that it agreed with the logic that the Arizona Supreme Court used as the basis for the Arizona decision, but was unwilling to be the first to address the issue. Therefore, there is no real or significant conflict between the nation's courts that requires this Court's intervention.

IV. THE ISSUES BEFORE THE ARIZONA SUPREME COURT, CONCERNING INTERLOCUTORY ISSUE 4, ARE TOO PRELIMINARY TO WARRANT REVIEW BY THIS COURT.

While a state or federal court decision may be sufficiently final to meet the jurisdictional requirements for a writ of certiorari, the decision may be too uncertain or preliminary to warrant this Court's granting such petition. That is the situation in this case. It is important, of course, to point out that the Arizona Court's determination as to Issue 4 is interlocutory. It is more important to note the factors in the decision itself which evidence the Arizona Supreme Court's recognition that neither it, nor the trial court, is finished with this issue – and that further proceedings will be necessary to determine whether Interlocutory Issue 4 will ever have a real effect on any Indian or other federal reservation, or on any non-federal water user.

The Arizona Court wrote:

> For the foregoing reasons, we hold that the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater. We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters

> necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Gila River III, 989 P.2d at 739.

In a footnote, the Arizona Court reiterated that "[u]ntil federal rights are quantified, it cannot be determined which if any of the tribes are entitled to such relief." 989 P.2d at 749 n. 12. The Arizona Court also noted that its decision on the definition of subflow (Interlocutory Issue 2, briefed and argued but not yet decided) could conceivably be broad enough to protect the rights of some or all of the federal reservations. 989 P.2d at 749. The decision on Interlocutory Issue 2 also affects whether Interlocutory Issue 4 will ever have a real-world effect.

At this time, no one knows if this issue is simply an interesting academic question that will never have an actual application. This Court should refuse to grant the Petition for Writ of Certiorari until it has been determined that the ruling actually affects some specific federal reservation and some actual non-federal water user.

The Arizona Supreme Court also recognized that questions of the effectiveness of the Arizona Groundwater Management Code must be answered before a determination can be made as to whether Interlocutory Issue 4 would have any impact in the case of a specific reservation. The Arizona Court wrote:

> We similarly approach [rejecting as premature] the state law parties' argument that federal reserved rights holders may be adequately protected against groundwater depletion by the 1980 Groundwater Management Code, which

> restricts application of the reasonable use doctrine and mandates conservation measures in some parts of Arizona. . . . Whether any particular reservation receives adequate protection of its reserved water rights through the combination of Arizona's common and statutory law remains to be determined.

Gila River III, 989 P.2d at 749 n. 13.

Until the specific facts concerning individual reservations have been analyzed in light of the provisions of the Arizona Groundwater Management Code, the Arizona Court's ruling on Interlocutory Issue 4 remains a matter of academic interest, without a current real-world application.

V. CONCLUSION

There are no compelling reasons that would justify granting the Petition for a Writ of Certiorari filed herein. Therefore, the Gila River Indian Community respectfully requests that the Court deny this Petition.

Respectfully submitted,

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EXPLANATORY DATA

The Arizona Department of Water Resources ("ADWR") divided the state into a number of water basins in its *Arizona Water Resources Assessment of August 1994*. The ADWR water basins are based on interrelated hydrology – surface and underground water – within distinct land areas. The size and shape of a water basin is determined by the geology of the region.

The Arizona Department of Water Resources *Assessment*, Volume I, *Inventory and Analysis*, August 1994, pages 13, 14, 139, 141, 153, 155, 173, 175, 192, and 194, provided the data for the water basin map, the water basin designation, the population data per water basin, and the water supply data per water basin. Population figures of less than 100 people were rounded up to 100. Water use figures of less than 1000 acre-feet were rounded up to 1000 acre-feet.

A determination was made as to whether a particular ADWR water basin contained federal reserved lands (federal lands that have been designated as a federal reservation, such as an Indian Reservations, Military Reservations, National Parks, National Monuments, etc.). Bureau of Land Management lands that have not been designated as federal reservations, with potential *Winters*/reserved water rights, were not considered.

The ADWR water basins that are shaded purple contain federal reservations that have surface water resources available to them, or would have had surface water resources available but for upstream and/or neighboring development and depletion. If an ADWR water basin has or had surface water resources, and is upstream

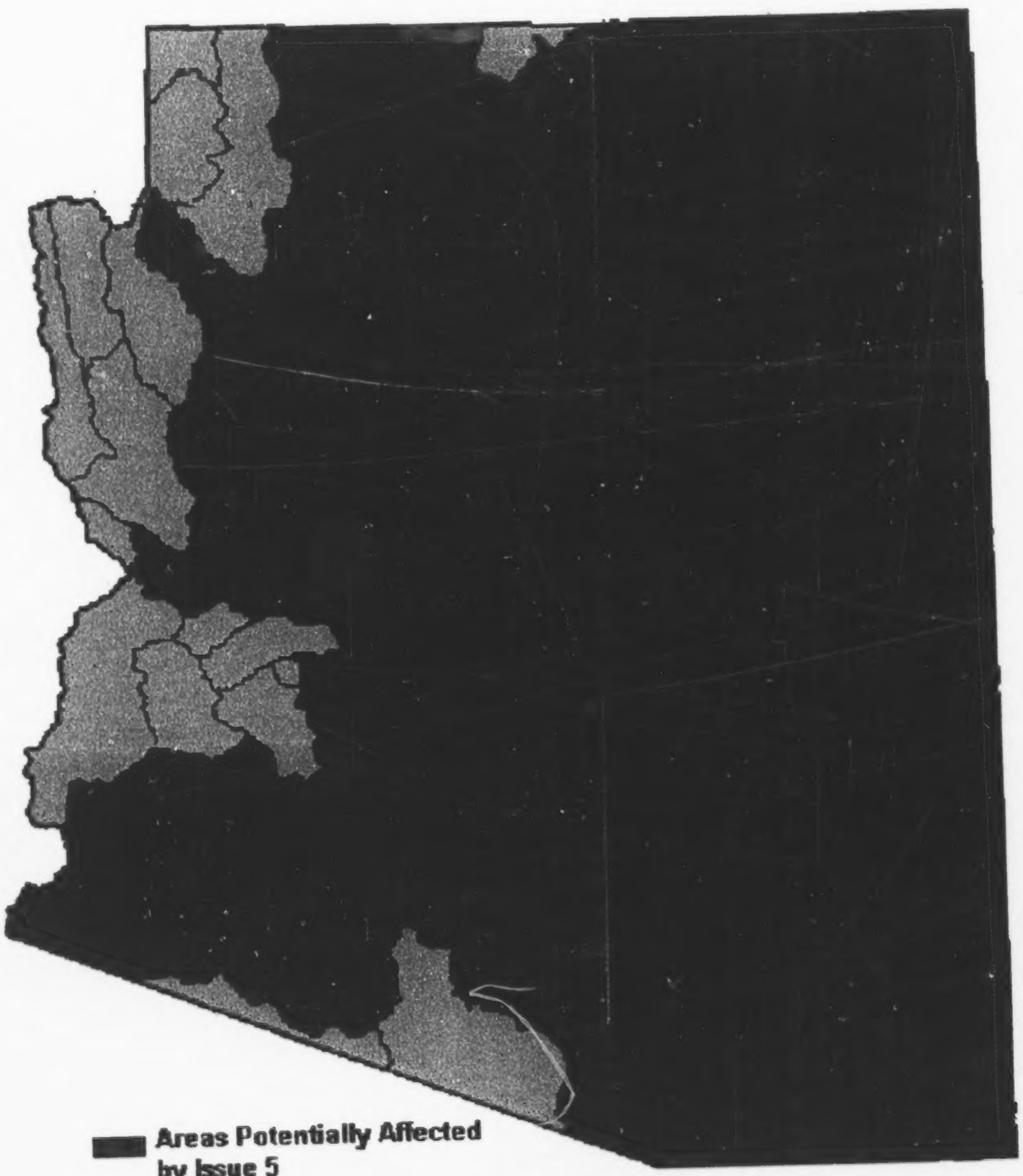
from a federal reservation that has or had surface water resources available to it, then this water basin is also shaded purple. An exception was made for any ADWR water basin that was 100% federal land, and was not upstream from another basin. [This water basin designation does not attempt to determine whether any of the federal reservations have any actual water rights. It only designates that the water basin does or did contribute to surface water that was or is available for use by the federal reservations, if such a water use right should be determined to exist.] ADWR water basins that contain federal reservations with actual or potential surface water resources provided from the Colorado River were not designated as purple because their water rights are governed by *Arizona v. California,* 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). The ADWR water basins that are shaded purple are subject to the Arizona Supreme Court determination on Interlocutory Issue 5; *i.e.,* that federal reserved rights holders are entitled to greater protection from groundwater pumping than are water users who hold only state law rights.

The ADWR water basins that are shaded green contain federal reservations that do not have surface water resources available to them, and did not have such resources available in the past. For these federal reservations, underground water is the only water resource available. If an ADWR water basin consisted totally of a federal reservation, it was not shaded green. The ADWR water basins that are shaded green are subject only to the Arizona Supreme Court determination on Interlocutory Issue 4; *i.e.,* that federal reserved water rights extend to groundwater (underground water) that is not subject to

prior appropriation under Arizona law. The water basins that are shaded green have no water resources available that would be subject to the Arizona Supreme Court's determination on Interlocutory Issue 5.

The ADWR water basins that are shaded yellow do not have a federal reservation and are not upstream of a federal reservation or, if they do have a federal reservation, that federal reservation's water use rights are governed by *Arizona v. California,* or are totally federally-owned.

Potential Impact of Issues 4 and 5 On Arizona's Hydrologic Regions



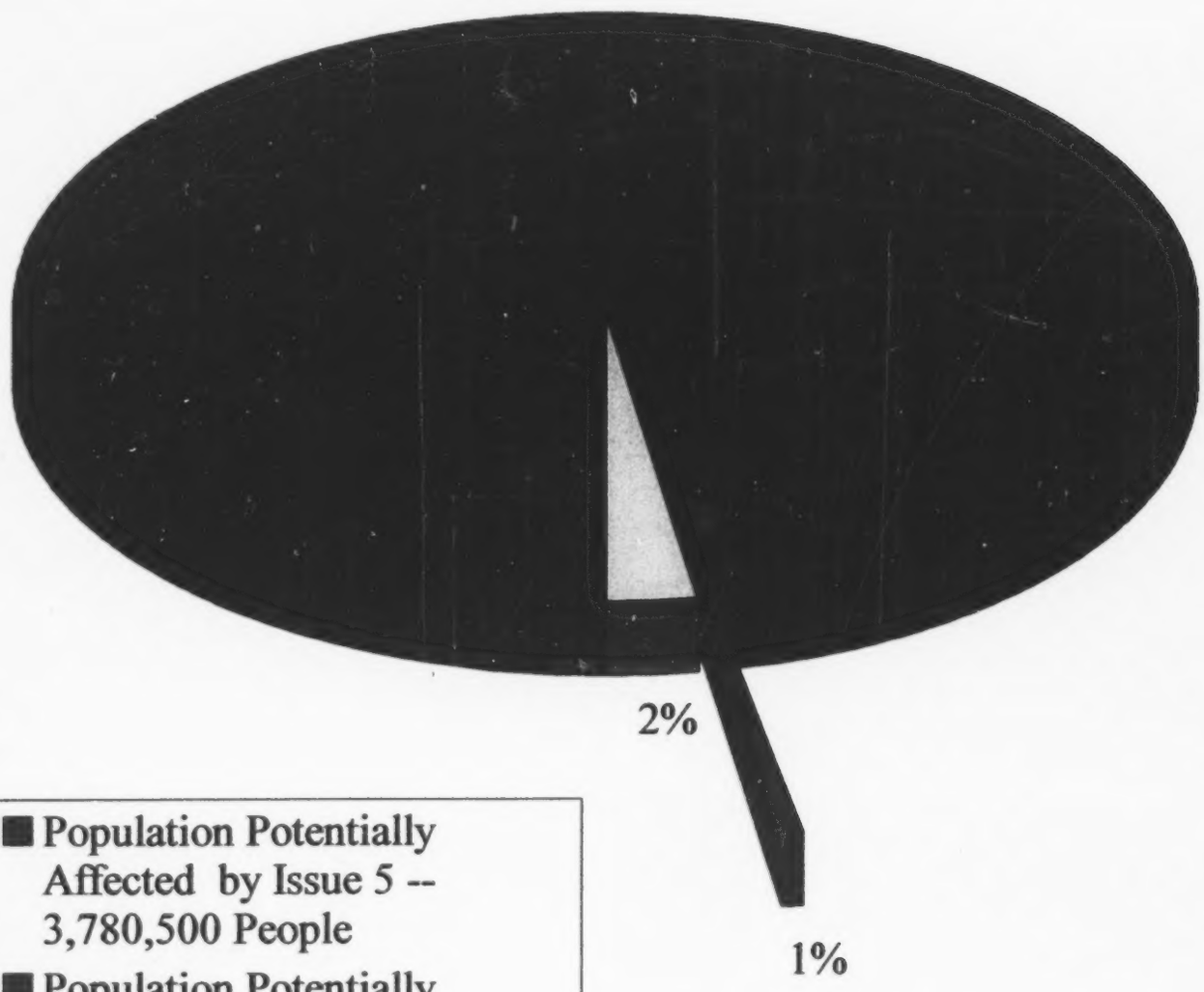
Areas Potentially Affected by Issue 5

Areas Potentially Affected by only Issue 4

Areas Unaffected by Issues 4 or 5

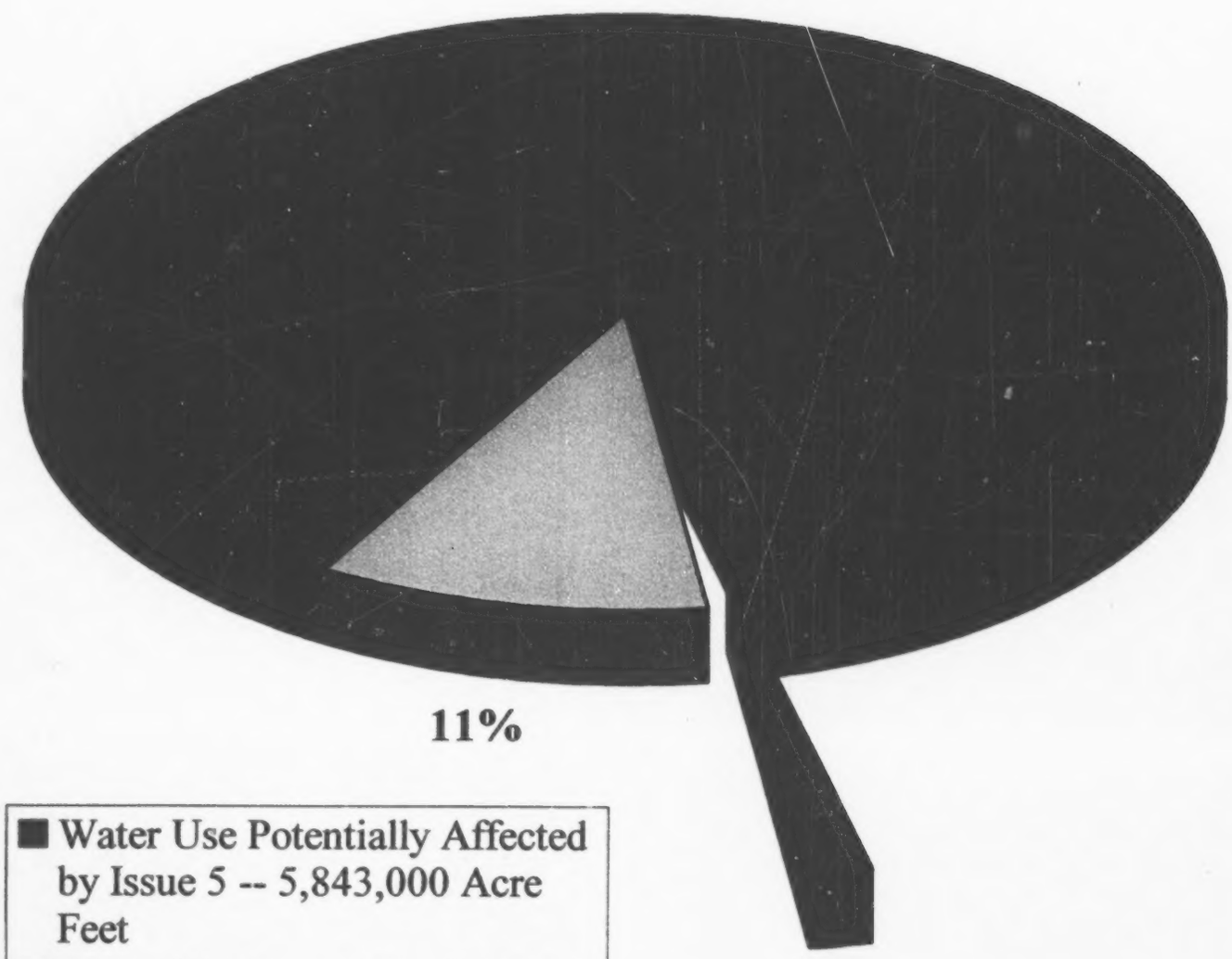
Map Base from ADWR Arizona Water Resources Assessment August 1994
Modifications and Determination of Regions by GRIC Office of Water Rights

Potential Impact of Issues 4 and 5 on Arizona's People



Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

Potential Impact of Issues 4 and 5 on Arizona's Water Use



Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

c. Petitioners also claim that the Arizona Supreme Court's decision warrants review because it is in conflict with the Wyoming Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River, supra.* See 99-1388 Pet. 28- 29; 99-1389 Pet. 11-12; Arizona Response 13. The Wyoming Supreme Court acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." 753 P.2d at 99. It nevertheless ruled, contrary to that logic, that the reserved water doctrine "does not extend to groundwater." *Id.* at 100. The Wyoming Supreme Court reached that result because it could find no case expressly holding that federal reserved water rights extend to groundwater. See *id.* at 99-100.

The Arizona Supreme Court properly rejected the Wyoming Supreme Court's reasoning. The Arizona Supreme Court stated:

> We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Pet. App. A17.[8] The Arizona Supreme Court has now provided a persuasive decision squarely holding that

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broadly, then the issue of whether federal reserved rights extend to percolating groundwater may turn out to be relatively unimportant.

[8] The Arizona Supreme Court also noted that there is more precedential support for its result than the *Big Horn* decision suggested. See Pet. App. A16 n.6, A17-A20 (discussing relevant cases).

the reserved water rights doctrine extends to groundwater. It is therefore possible that, if the Wyoming Supreme Court were faced with the issue again, it might well reconsider its decision and reach the "logical" outcome. At a minimum, the apparently divergent decisions of the Arizona Supreme Court and the Wyoming Supreme Court—which reflect the views of only two of the fifty States and have not yet resulted in any practical consequences for any water user—do not give rise to a mature conflict that would warrant this Court's review. Accordingly, even if the Arizona Supreme Court's decision were a final judgment for purposes of 28 U.S.C. 1257(a), it would not present a matter warranting this Court's review at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

Supreme Court, U.S.
FILED
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(6) (4)

Nos. 99-1388 and 99-1389

In the Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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25pp

QUESTION PRESENTED

Whether a federal reserved water right may be satisfied from groundwater that, under Arizona law, is not subject to the doctrine of prior appropriation.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona (Pet. App. A1-A31) is reported at 989 P.2d 739. The order of the Superior Court of the State of Arizona (Pet. App. D1-D30) is unreported.

JURISDICTION

The decision of the Arizona Supreme Court was entered on November 19, 1999. The petitions for a writ of certiorari were filed on February 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). As discussed at pages 8-15, *infra*, this Court

does not have jurisdiction because the Arizona Supreme Court's interlocutory opinion is not a final judgment within the meaning of 28 U.S.C. 1257(a).

STATEMENT

Petitioners seek review of an interlocutory decision of the Arizona Supreme Court in an ongoing general stream adjudication of the Gila River System. The United States was joined as a defendant under the McCarran Amendment, 43 U.S.C. 666. The Arizona Supreme Court certified a set of issues for interlocutory appeal, and that court addressed two of those issues, involving the relationship between federal reserved water rights and Arizona's system for administering groundwater, in the decision that petitioners ask this Court to review.

1. This Court ruled in *Winters* v. *United States*, 207 U.S. 564 (1908), that the establishment of an Indian reservation carries with it an implicit reservation of sufficient water to accomplish the purpose of the reservation. The Court has recognized that principle, sometimes referred to as the *Winters* doctrine or the doctrine of federal reserved water rights, on numerous occasions. See, *e.g.*, *United States* v. *New Mexico*, 438 U.S. 696, 698 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Arizona* v. *California*, 373 U.S. 546, 599-600 (1963); see also *United States* v. *City & County of Denver*, 656 P.2d 1, 17-18 (Colo. 1983). The *Winters* case involved an Indian reservation, but the Court has made clear that the principle applies to other types of federal reservations. See *Cappaert*, 426 U.S. at 138 (national monument); *Arizona* v. *California*, 373 U.S. at 601 (Indian reservations created by executive order, national forests, national recreation areas, and national wildlife refuges).

The Court will recognize a federal reserved water right if the circumstances surrounding the creation of a federal reservation indicate that the government intended to set aside water for a federal purpose. See *Cappaert*, 426 U.S. at 139. The Court infers that the government intended to do so if water is "necessary to accomplish the purposes for which the reservation was created." *Ibid.*; accord *New Mexico*, 438 U.S. at 702 ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

The determination of the parameters of the federal reserved water right, such as the amount of water reserved, inevitably requires a fact-intensive inquiry. See *Denver*, 656 P.2d at 20. Because federal reserved water rights are established by federal law, they can, and frequently do, have different characteristics than water rights created under state law. See, *e.g.*, *Cappaert*, 426 U.S. at 145; see also *United States* v. *Jesse*, 744 P.2d 491, 494 (Colo. 1987).

2. Arizona law generally classifies water into three categories: (1) surface water, such as lakes, ponds, rivers, and streams, including underground streams; (2) "subflow" groundwater that is closely connected hydrologically to surface water; and (3) "percolating" groundwater that is not so closely connected to surface water. See Pet. App. A10-A11. Rights to the first two categories, surface water and subflow groundwater, are governed by the state law doctrine of "prior appropriation." Rights to percolating groundwater, however, are

subject to the state law doctrine of "reasonable use." See *id.* at A10.[1]

Prior appropriation rights differ significantly from reasonable use rights. Under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time." *Arizona* v. *California*, 373 U.S. at 555. The reasonable use doctrine, on the other hand, permits a landowner to capture as much of the groundwater underlying the landowner's property as can be used on the overlying land, regardless of whether the landowner's pumping of groundwater diminishes the water available to others. See *Bristor* v. *Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). Under the "reasonable use" doctrine, no groundwater user has a secure right to pump a specific quantity of water, because pumping is always susceptible to being interfered with, without liability, by neighbors making reasonable use of groundwater on their overlying land. See, *e.g.*, *Farmers Inv. Co.* v. *Bettwy*, 558 P.2d 14, 25 (Ariz. 1976) (Cameron, C.J., dissenting).

The Arizona Supreme Court's decision here addressed the issue of whether the United States can claim a federal reserved right to water that Arizona would classify as "percolating groundwater." In petitioners' view, a federal reservation's rights to percolat-

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[1] Arizona has also enacted legislation that addresses groundwater use. See Ariz. Rev. Stat. Ann. §§ 45-401 *et seq.* (West 1994 & Supp. 1999). That legislation, which is not at issue here, may play a significant role in regulating groundwater in certain areas of the State. See John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657, 707-725 (1988).

ing groundwater should be governed by Arizona's reasonable use doctrine. The question is potentially significant because, if a federal reservation were subject to the "reasonable use" doctrine, it might potentially be entitled to more groundwater than under the federal reserved water rights doctrine, but the right would be less secure, because the groundwater source would be subject to depletion by groundwater pumping on adjacent land. A federal reserved water right, by contrast, would limit the federal reservation to the quantity of groundwater necessary to fulfill the needs of the reservation, but it would also prevent adjacent landowners from pumping groundwater if that pumping interferes with the reservation's right to receive sufficient water to meet its needs. See *Cappaert*, 426 U.S. at 142-143.

3. This case arose out of a general stream adjudication in accordance with Arizona law. See Ariz. Rev. Stat. Ann. §§ 45-251 to 45-260 (West 1994 & Supp. 1999). The adjudication will determine all rights to use waters of the Gila River System in Arizona. The adjudication's history is described in *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 557-559 (1983). See also *In re Rights to the Use of the Gila River*, 830 P.2d 442, 444-445 (Ariz. 1992); *United States* v. *Superior Court*, 697 P.2d 658, 663-664 (Ariz. 1985). The United States claims federally reserved water rights to the use of certain waters in the Gila River System on its own behalf and as trustee for several Indian reservations. The United States also claims water rights arising under Arizona law, as well as rights confirmed by the 1935 Globe Equity Decree entered by the United States District Court for the District of Arizona. See *United States* v. *Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992) (action to enforce the 1935 decree).

In 1988, during the early phases of this adjudication, the trial court entered a "Groundwater/Surface Water Order" that addressed several general physical and legal aspects of groundwater-surface water relationships, including various generic issues regarding federal reserved water rights. See Pet. App. D1-D32. The court's order included a ruling that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose." *Id.* at D23.

Numerous parties petitioned the Arizona Supreme Court for interlocutory review of the Groundwater/Surface Water Order. The Arizona Supreme Court granted some of the petitions, granted others in part, and denied others. See Pet. App. B1-B17. The Arizona Supreme Court certified six issues for interlocutory appeal. See *id.* at B2-B3. Among the certified questions was the issue of whether federal reserved water rights in Arizona extend to groundwater that is not subject to the doctrine of prior appropriation under Arizona law. See *id.* at B3.

The Arizona Supreme Court's determination of the certified questions was interrupted by a 1995 challenge to the constitutionality of Arizona legislation that amended certain provisions of state water law. See Pet. App. A7-A9. The Arizona Supreme Court has since resumed consideration of the certified questions and has unanimously ruled that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Id.* at A30. The court explained that

> if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Id. at A20. The court acknowledged that its ruling would recognize water rights in connection with federal reservations that they would not have under state law, but noted that it could not apply state law "where to do so would defeat federal water rights." *Id.* at A22. Finally, the court noted that its decision

> do[es] not * * * decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Id. at A24.

ARGUMENT

This Court should decline to review the Arizona Supreme Court's decision because that decision is not a final judgment within the meaning of 28 U.S.C. 1257(a), the jurisdictional provision that governs this Court's review of state court decisions. Even if the Arizona

Supreme Court's decision were final, further review is unwarranted because the decision is correct and does not create any conflict with other decisions that would warrant the Court's review at this time.

1. This Court has jurisdiction to review by writ of certiorari decisions by the highest court of a State involving federal law if the state court decision is a "[f]inal judgment[] or decree[]." 28 U.S.C. 1257(a). The Arizona Supreme Court's avowedly "interlocutory opinion[]" (Pet. App. A6) in this case does not constitute a final judgment for purposes of 28 U.S.C. 1257(a). This Court therefore should deny the petitions for a writ of certiorari.

a. Section 1257(a) "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market Street Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). The finality rule "is not one of those technicalities to be easily scorned" but instead "is an important factor in the smooth working of our federal system." *Ibid.* (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).[2]

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[2] In *Jefferson*, the petitioner asked this Court to review whether a state wrongful death statute governs recovery of damages when a decedent's estate claims, under 42 U.S.C. 1983 (Supp. III 1997), that the death resulted from a deprivation of federal rights. See 522 U.S. at 77. The state supreme court had decided that question of federal law on a pretrial interlocutory certification by the trial court. This Court initially granted a petition for a writ

The Arizona Supreme Court's decision in this case is plainly not a final judgment. Like the order at issue in *Jefferson*, it is an "avowedly interlocutory" decision that arose from the state court's decision to certify certain questions. Compare *Jefferson*, 522 U.S. at 81, with Pet. App. A6, A8. The Arizona Supreme Court's decision does not terminate the litigation or resolve any of the claims in the water adjudication. Rather, it simply provides guidance to the trial court on several preliminary matters respecting the federal water rights claims. As the Arizona Supreme Court stated:

> We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater.

Pet. App. A24. The Arizona Supreme Court's decision is clearly an "intermediate step[]"—and not that court's "final word"—on the federal water rights claims. See *Jefferson*, 522 U.S. at 81. As in *Jefferson*, the petitioners' challenges may become moot as the litigation progresses. If they do not become moot, petitioners will be able to seek this Court's review "when the state-court proceedings reach an end." *Id.* at 77-78, 82-83.

b. Here, as in *Jefferson*, the state supreme court's decision does not fall "within the 'limited set of situations in which [the Court has] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts.'" 522 U.S. at 82 (quoting *O'Dell* v. *Espinoza*, 456 U.S. 430 (1982) (per curiam)).

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of certiorari on that question, but, after argument, "dismiss[ed] the writ for want of a final judgment." *Id.* at 78.

Specifically, the decision does not fall within any of the four situations that the Court identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), in which the decision of a state court is effectively final notwithstanding the prospect of further state court action.[3]

The Arizona Supreme Court's decision plainly does not fall within the first two categories identified in *Cox Broadcasting*, which involve situations in which the court's interlocutory decision effectively resolves the federal claim, regardless of proceedings on remand, and the decision is therefore final for purposes of this Court's review. In this case, the state supreme court's decision leaves no doubt that final resolution of the federal claim depends on proceedings on remand. The state supreme court ruled that "[f]ederal reserved

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[3] *Cox Broadcasting* identifies four categories of cases in which a state court decision may satisfy Section 1257(a)'s finality requirement, notwithstanding the pendancy of proceedings on remand: (1) "cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) "cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case"; and (4) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." See 420 U.S. at 477-483.

rights extend to groundwater *to the extent groundwater is necessary to accomplish the purpose of a reservation.* Pet. App. A30 (emphasis added). Thus, under the interlocutory ruling of the Arizona Supreme Court, the United States will not be entitled to satisfy a federal reserved water right from groundwater unless it additionally demonstrates, in the proceedings on remand, that a particular reservation at issue in this case requires groundwater to accomplish the purposes of the reservation. Thus, the federal issue decided here is not ripe for review "regardless of the outcome of future state-court proceedings." *Jefferson*, 522 U.S. at 82 (quoting *Cox Broadcasting*, 420 U.S. at 480).

The Arizona Supreme Court's decision also does not fall into the third category described in *Cox Broadcasting*, which involves the situation in which the state court has resolved a federal claim and remanded the case for further proceedings, "but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Jefferson*, 522 U.S. at 82 (quoting *Cox Broadcasting*, 420 U.S. at 481). That situation typically arises where a state court reverses a criminal conviction on federal constitutional grounds and remands for retrial. If the State obtains a conviction on retrial, the federal issue is moot, and if the State obtains an acquittal on retrial, the Double Jeopardy Clause would foreclose an appeal to revisit the state court's resolution of the federal constitutional issue. See *Cox Broadcasting*, 420 U.S. at 481. This case does not present that problem. Here, as in *Jefferson*, petitioners would be free to seek this Court's review if the state court finally determines the relevant issues in a way that is adverse to petitioners' interests. See *Jefferson*, 522 U.S. at 82-83.

The petitioners in No. 99-1388 ultimately rely on the fourth category described in *Cox Broadcasting*. See 99-1388 Pet. 9-13.[4] That category embraces the situation in which (a) the party seeks review of a federal issue that "has been finally determined by the state courts for purposes of the state litigation"; (b) the party might prevail on remand on non-federal grounds, but reversal of the state court on the federal issue would preclude "any further litigation on the relevant cause of action"; and (c) this Court's "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483. The Arizona Supreme Court's decision, however, satisfies none of the three criteria.

First, the decision does not "finally determine[]" any federal water rights claim; the state supreme court remanded the case for the trial court to determine the individual federal reserved water claims based on the underlying purposes of each federal reservation. Second, the decision does not preclude further litigation on the relevant cause of action. The United States has asserted federal reserved water rights for various federal reservations without regard to whether the water source is surface water or groundwater, and the state court must determine the federal reserved rights for each reservation, regardless of whether groundwater is included or excluded. Third, the Arizona Supreme Court's recognition that the federal government may establish a federal reserved water right that includes groundwater, provided it makes the requisite showing of a federal intent to reserve the water, does not "erode" any federal policy. Rather, the court's

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[4] The petitioners in No. 99-1389 do not address the finality issue.

ruling effectuates both the policy of providing water to satisfy the needs of federal reservations consistent with the *Winters* doctrine and the overarching constitutional principle that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. See discussion at 15-19, *infra*.

c. Petitioners suggest (99-1388 Pet. 13) that this Court has created a special exception to the finality requirement for water rights adjudications, citing *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Wyoming* v. *United States*, 492 U.S. 406 (1989) (per curiam). Each of those cases, however, fell squarely within the second situation described in *Cox Broadcasting*. In *New Mexico*, the New Mexico Supreme Court had rejected the United States' claim of an entitlement to use water within the Gila National Forest for particular recreational and wildlife purposes. See *Mimbres Valley Irrigation Co.* v. *Salopek*, 564 P.2d 615 (1977), aff'd, 438 U.S. 696 (1978). In *Wyoming*, the Wyoming Supreme Court had determined a quantification of the United States' water rights claim for the Wind River Indian Reservation in Wyoming under the practicably irrigable acreage standard. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (1988), cert. denied, 492 U.S. 926 (1989). In each of those cases, the state supreme court's judgment was final for purposes of Section 1257(a) because the judgment finally determined the federal reserved water rights claim for a specific reservation and any further proceedings on remand would not affect the outcome for the reservation in question.

The Arizona Supreme Court's decision in this case presents a markedly different situation. The state court has not determined federal reserved water rights for *any* individual federal reservation. It has simply resolved one of several threshold issues for quantifying the United States' water rights for various reservations. The decision leaves to future litigation the "inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." Pet. App. A24. There is no warrant for this Court to assume jurisdiction at this juncture, where the state supreme court has not determined whether "any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." *Ibid.*

2. Even in the absence of the jurisdictional obstacle, the Arizona Supreme Court's ruling would not warrant this Court's review, especially at this interlocutory stage of the case. The state supreme court's decision is correct, it will have no immediate impact on any water user, and there is no conflict among the lower courts that would warrant the Court's review at this time.

a. The Arizona Supreme Court reached the common sense conclusion that "if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand." Pet. App. A20. As the court correctly observed,

> The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Ibid. The state supreme court accordingly held that "the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater." *Id.* at A24. "Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Id.* at A30.

The Arizona Supreme Court's ruling is unremarkable. There can be no serious doubt that Congress has the constitutional power to reserve unappropriated water for federally owned lands and to authorize the Executive Branch to make such reservations. See, *e.g.*, U.S. Const. Art. IV, § 3, Cl. 2; *Arizona* v. *California*, 373 U.S. at 597-601. As the state supreme court recognized, the question is simply one of federal intent. There is no reason to believe, as an "abstract" principle (Pet. App. A24), that the United States can never reserve that particular subset of groundwater that Arizona jurisprudence labels "percolating" groundwater. Rather, when the United States reserves water and does not designate the source, it is reasonable to conclude that the water would be taken from whatever water source is available to the reservation to meet the needs of the reservation. See *id.* at A19.[5]

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[5] As the state supreme court explained, "The reservations considered [in *Winters* v. *United States* and *Arizona* v. *California*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life." Pet. App. A19.

Petitioners' objections to the Arizona Supreme Court's ruling do not require extended discussion. There is no merit to petitioners' contention that the state supreme court's decision "frustrates clear federal policies and conflicts with controlling decisions of this Court." 99-1388 Pet. 14-22 (capitalization removed). To the contrary, the Arizona Supreme Court's decision effectuates the important federal policy, recognized in this Court's decisions, of ensuring that federally owned lands that are set aside for federal purposes have sufficient water to fulfill those purposes. See, *e.g.*, *Cappaert*, 426 U.S. at 143 ("Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water.").

Petitioners are also plainly wrong in contending that the state supreme court departed from this Court's teachings by "finding a federal reserved right to groundwater without considering the purposes of any specific reservation." 99-1388 Pet. 14-16 (capitalization altered). The state court made clear it was merely addressing the question of whether federal reserved rights must, in Arizona, apply only to surface water and are incapable, as a matter of law, of including groundwater. The court explicitly stated that its decision did not "decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." Pet. App. A24.

Petitioners are likewise mistaken in arguing that the Arizona Supreme Court should have "integrate[d] federal groundwater rights with existing state groundwater law." 99-1388 Pet. 16-17 (capitalization altered). In petitioners' view, the state supreme court should

have relied upon "the application of Arizona groundwater law in determining the nature of federal rights to groundwater." *Id.* at 17. The state supreme court correctly recognized, however, that this Court "has defined the reserved rights doctrine as an exception to Congress's deference to state water law." Pet. App. A21 (citing, *e.g.*, *New Mexico*, 438 U.S. at 714); see *Cappaert*, 426 U.S. at 145 ("determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation").[6]

Petitioners also assert that the Arizona Supreme Court has created a federal common law of reserved rights in groundwater and that, in doing so, it should have adopted "state law as the rule of decision." 99-1388 Pet. 17-22; 99-1389 Pet. 23-28; Arizona Response 20. That argument, however, misconceives the Arizona Supreme Court's decision. The court did not create a

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[6] Petitioners erroneously suggest that this Court's statement in *Cappaert* that a "reserved right in unappropriated water" is "superior to the rights of future appropriators" (426 U.S. at 138) indicates that federal reserved water rights apply only to water that could be appropriated under state law. 99-1388 Pet. 16. Petitioners' interpretation ignores the context of that statement. The Court used the term "unappropriated" as a short-hand expression for waters to which no vested rights had attached prior to the date of the creation of the federal reservation. It made that understanding clear elsewhere in the opinion when it stated that "the issue is whether the Government intended to reserve unappropriated *and thus available* water." 426 U.S. at 139 (emphasis added). The significance of water being "unappropriated" is that no prior rights have attached to it and, therefore, it is "available" to satisfy the purposes of the federal reservation. The United States can also reserve available water that is not subject to appropriation under state law. Indeed, if petitioners' contention were correct, it would lead to a stark anomoly: Congress could reserve water only in those States that adopted an appropriative water rights system. Nothing in the Property Clause ties Congress's hands in that way.

new body of federal common law; rather it simply adhered to this Court's reasoning in *Winters*, *Cappaert*, and *New Mexico* and refused to carve out a special exception to the federal reserved water rights principles articulated in *Winters* and subsequent cases based on a State's "arti[ficial]" distinctions between surface flow, subflow, and "percolating groundwater." See Pet. App. A10-A12. The Arizona Supreme Court's decision follows *a fortiori* from this Court's decisions: "the federal reserved right extends to groundwater when groundwater is necessary to accomplish the purpose of a federal reservation." *Id.* at A27.

There is no warrant for adopting state water law principles to determine federal water rights–especially when, as the Arizona Supreme Court candidly acknowledged, those principles rest on "a hydrological misconception." See Pet. App. A11. This Court made clear in *Cappaert* that the "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation." 426 U.S. at 145. The Arizona Supreme Court correctly recognized that federal reserved rights are determined through "fact-intensive inquiries that must be made on a reservation-by-reservation basis" (Pet. App. A24) and not through the wholesale adoption of state rules of decision that are likely to have no direct bearing on (or may even directly frustrate) the "federal purpose of the reservation." See *Cappaert*, 426 U.S. at 143-146.

b. Some of the petitioners contend that the Arizona Supreme Court's decision will have "grave" and "disastrous" consequences for Arizona water users. 99-1389 Pet. 15-23; see also 99-1388 Pet. 22-24. Those assertions are hyperbole. The state supreme court affirmed a *1988* trial court ruling that "the federal reserved water rights doctrine applies not only to surface water but to

groundwater." Pet. App. A24; see *id.* at D23. The state supreme court also made clear that its decision does not "decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." *Id.* at A24. The situation is no different now than it was before the state supreme court's ruling, save that the state supreme court has now affirmed the trial court's long-outstanding determination of a particular legal issue that may or may not have significance with respect to any particular federal reservation. The state supreme court's interlocutory decision will have no immediate impact, and its ultimate practical effect cannot be judged until the trial court adjudicates the United States' water rights claims.[7]

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[7] Petitioners have no basis for suggesting that "most of the heretofore non-appropriable groundwater would be controlled by a few federal enclaves" or that "[m]ost other landowners * * * would be forced to cease or sharply curtail their pumping [of groundwater], causing extensive dislocation and hardship." 99-1389 Pet. 20-21. Indeed, petitioners' predictions that grave consequences will result from the Arizona Supreme Court's decision contradict their later assertion that Arizona law already entitles federal reservations to sufficient groundwater to meet the reservations' purposes. See *id.* at 24. Furthermore, a significant premise underlying the petitioners' arguments—that most of Arizona's groundwater is "percolating" groundwater—is open to debate. As the state supreme court explained, Arizona law distinguishes between "subflow" groundwater, which is subject to the doctrine of prior appropriation and "percolating" groundwater, which is not. Pet. App. A10-A11. The boundary between subflow groundwater and percolating groundwater "is, to some extent, artificial and fluid" and remains to be resolved by Arizona courts. *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 857 P.2d 1236, 1246 (Ariz. 1993) (vacating and remanding to the trial court for a determination of the criteria for differentiating between appropriable subflow and percolating groundwater). If the Arizona courts define the subflow zone

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Nos. 99-1388, 99-1389

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION, *et al.*,

Petitioners,

-and-

SALT RIVER VALLEY WATER USERS' ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENTS THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE AND THE YAVAPAI-APACHE NATION

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INTRODUCTION

Respondents are the San Carlos Apache Tribe, the Tonto Apache Tribe and the Yavapai-Apache Nation, all federally recognized Indian tribes located on federal reservations in Arizona (herein the "Apache Tribes").[1] The Apache Tribes' Brief in Opposition responds to the Petitions filed by Phelps Dodge and Salt River Project.[2]

The Respondents Apache Tribes were before this Court in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (herein "*San Carlos*"). Seventeen years later, not a single water right has been adjudicated in the Arizona stream adjudication.[3]

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1. The law firm of Sparks, Tehan and Ryley, P.C., undersigned counsel has represented the Apache Tribes since 1974 in these matters and was designated by the Arizona Supreme Court as lead counsel to represent Arizona Indian tribes in *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (herein *"Gila River III"*). *See also In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442 (1992) (*"Gila River I"*) (Interlocutory Issue 1) (trial court procedures approved, including service by mail); and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (1993) (*"Gila River II"*) (Interlocutory Issue 2) (the "subflow" issue, remanded to trial court with second decision by the Arizona Supreme Court now pending).

2. *See* Petitions for Writ of Certiorari filed by, *Phelps Dodge Corporation, et al.* (herein "Phelps Dodge") *v. United States, et al.*, No. 99-1388; *and Salt River Valley Water Users' Association, et al.* (herein "Salt River Project") *v. United States, et al.*, No. 99-1389. The Phelps Dodge and Salt River Project petitions seek review by this Court of Issue 4 decided by the Arizona Supreme Court in *Gila River III*, *i.e.*, that federal reserved rights extend to groundwater to the extent necessary to fulfill the purposes of a reservation.

3. Moreover, there has been no adjudication of any federal or state water rights in Arizona since the first general stream adjudication proceeding was initiated in 1974. *See* "Phelps Dodge Petition" at p. 5: "The magnitude of this case and the significance of the issues it raises have resulted in many years of litigation without any final adjudication of specific water rights."

The Apache Tribes appeared and have faithfully participated in the Arizona proceedings. *Id.* at 545 n.17. As instructed by this Court in *San Carlos*, the Arizona courts have honored the "solemn obligation to follow federal law." *Id.* at 571.

Petitioners complain here that the Supreme Court of Arizona has applied federal law in a preliminary decision that Indian reservations may have a reserved right to groundwater where the trial court finds that surface water is inadequate to accomplish the purposes for which the reservation was established. They argue that state law should have been adopted as the federal rule.

Arizona's groundwater law defies hydrological reality. *See United States v. J. Ed Smith*, 625 F.2d 278, 280 (9th Cir. 1980) at n.3. It is based upon an "artifice . . . that rests on a hydrologic misconception. 175 Ariz. at 389, 857 P.2d at 1243." *Gila River III* at 743. The Arizona Supreme Court observed that "conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface water supplies." *Id.* at 744. Arizona has not. *See also Gila River II*, 857 P.2d at 1240.

Petitioners desire to apply this antiquated "political" hydrology to water rights for federal reservations. *Gila River III* at 747.

The Arizona Supreme Court recognized that some Indian reservations in Arizona "depend for present and future survival substantially or entirely upon pumping of underground water." *Gila River III* at 746. It has seen rivers pumped dry and Indian reservations "entirely dewatered" by off-reservation pumping under Arizona's "reasonable use" doctrine. *Id.* at 748.

In *San Carlos*, the Court cautioned that:

> . . . any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate

> with the powerful federal interest in safeguarding those rights from state encroachment.

San Carlos at 571.

The Arizona Supreme Court reviewed state law and the history of the depletion of flowing streams and groundwater in Arizona, and determined that State law is inadequate to protect federal rights where groundwater is necessary to fulfill the purposes for which federal reservations were established. This Court honors the decisions of the States' highest court when interpreting state law. *Johnson v. Frankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997); *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978); and *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967).

The Arizona Supreme Court cited the reasoning of this Court in *Arizona v. California* in finding a reserved right to groundwater where this Court declared it is:

> "impossible to believe" that those who created the Colorado River Indian Reservation "were unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona v. California*, 373 U.S. at 599. The reservations considered in those cases depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for

> habitation without reserving the water necessary to sustain life.

Gila River III at 746.

The Arizona decision is necessarily "a preliminary judgment on the question of Indian water rights." *San Carlos* at 569.

Observing the Court's reasoning in *United States v. New Mexico*, the Arizona court found a reserved right to groundwater could only be found where other waters are inadequate to accomplish the purpose of a reservation. "To determine the purpose of a reservation and to determine the water necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *United States v. New Mexico*, 438 U.S. at 700. *Gila River III* at 748.

Gila River III is abstract:

> In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

Gila River III at 705.[4]

Eventually, after a trial on the merits concerning a specific reservation, these intimately related federal questions will be decided in a factual setting and reviewed by the Arizona Supreme Court. A "final judgment" has long been the standard of the Court in these cases. If Petitioners can show specific harm in violation of federal law under a final judgment at that time, this Court would have jurisdiction under 28 U.S.C. § 1257(a).

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4. In *United States v. Cappaert*, a standard was crafted that protected the purpose for which Devil's Hole National Monument was established after extensive fact findings to determine the measures necessary to protect the federal purpose. *See also San Carlos* at 571.

At this point in the Arizona proceedings, *Gila River III* merely assures that state groundwater pumpers are on notice[5] and are participating in the adjudication as is necessary to preserve the comprehensive requirements of the McCarran Amendment[6] and to avoid piece-meal adjudication.[7] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) (herein "Colorado River"). *Gila River I.*

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation ("Apache Tribes") are parties in "In Re The General Adjudication Of All Rights To Use Water In The Gila River System And Source," Consolidated Case Nos. W1-4.

The Apache Tribes are federally recognized pursuant to the Apache Treaty, July 1, 1852, 10 Stat. 979, and Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* The Reservations of the Tribes are all within their original aboriginal homelands under the Apache Treaty. *See United States v. Santa Fe Pacific Railroad Co.*, 315 U.S. 339 (1941), *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983). *In the Treaty of Guadalupe Hidalgo*, 9 Stat. 922, Feb. 2, 1848, the Apache Tribes were to be free and secure in their tribal homelands. *See id.* Articles VIII, IX, XI, XXII.2.

A. The San Carlos Apache Tribe.

The San Carlos Apache Reservation (herein "the Reservation") was established by Executive Orders of President Grant on November 9, 1871, and December 14, 1872. There are approximately two thousand eight hundred and fifty-five (2,855) square miles within the current Reservation (1,827,200

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5. *See Gila River I, Gila River III* at 748.

6. The McCarran Amendment, 43 U.S.C. § 666 (herein "McCarran Amendment"), *Arizona v. San Carlos, id.* at 565 n.16, 569, 570; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976).

7. *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983).

acres). The United States holds title to the lands within the Reservation in trust for the benefit of the San Carlos Apache Tribe. The Reservation is in Gila, Graham, and Pinal Counties in eastern Arizona. Tribal membership is approximately 12,000.

The Reservation is in the Upper Salt River, the Upper Gila River, and the San Pedro River "subwatersheds" of the Arizona General Stream Adjudication W-1 through W-4. Most major surface streams in central Arizona run through, border, arise on, or are tributary to surface and underground water on the Reservation, including without limitation, the Black River, Salt River, the Gila River, Ash Creek, Willow Creek, Eagle Creek, Bonita Creek, Deer Creek, Salt Creek, and San Pedro River.

The San Carlos Apache Reservation is surrounded on three sides by federal land administered by the National Forest and Bureau of Land Management. The north boundary of the San Carlos Apache Reservation is the south boundary of the White Mountain Apache Reservation. The San Carlos and White Mountain Apache Reservations were once one, but later divided along the Black and Salt Rivers into the two separate Reservations which exist today.

The Gila River is the only stream with a Decree (Globe Equity No. 59) which purports to adjudicate certain rights on the San Carlos Reservation. That Decree provides only 6,000 acre-feet of water for 1,000 acres of irrigation along the Gila River in the San Carlos Apache Reservation, with a priority date of 1846. All residential, governmental, and commercial water use on the Reservation is from underground wells. There is no present substantial surface water use or development on the Reservation, with the exception of stockwatering, wildlife, and recreation.

B. Tonto Apache Tribe.

The Tonto Apache Tribe is a federally recognized Indian Tribe pursuant to P.L. 92-470, 86 Stat. 783, October 6, 1972. The Tonto Apache Tribe consists of over 100 members on the 85 acre Tonto Reservation located south of Payson, Arizona in Gila County. One-half of the Reservation is in the upper Salt

sub-watershed and one-half of the Reservation is in the upper east Verde sub-watershed of the Arizona General Stream Adjudication W-1 through W-4.

The Tonto Apache Reservation is surrounded on three sides by the Tonto National Forest and on the north by the Town of Payson. The Reservation has no surface water supply. The Tribe relies upon groundwater from a well which was developed by the United States to serve the Reservation. The parcel of land where the Tribal well is located was later traded into private ownership by the National Forest. To protect the Tribal water supply, federal deed restrictions were placed on the patent of property by the United States which prohibits the private owner from polluting the groundwater and from withdrawing groundwater from the land around the well site. Nearby pumping has reduced the production of the federal well which is now inadequate to meet the present needs of the Tonto Apache Reservation.

C. Yavapai-Apache Nation.

A Reservation was established by Executive Order on October 3, 1871, ten miles on both sides of the Verde River for forty-five miles, which Reservation was to serve as a permanent tribal homeland for both Tribes "as long as the grass shall grow and the stream shall flow." The Yavapai-Apache Nation has approximately 2000 members.

In the late winter of 1875, both Tribes were forcibly removed from the Verde Valley In "Trail of Tears." On April 23, 1875, the Reservation was terminated by Executive Order. Tribal members were forced through the snow nearly 180 miles to the San Carlos Reservation where they were incarcerated. Many men, women, and children perished on the way. Some escaped on route and returned to the Verde Valley. The remaining survivors walked back from San Carlos to the Verde Valley beginning In 1886. Many arrived after the start of construction of Roosevelt Dam at the confluence of the Salt River and Tonto Creeks In 1909. They were permitted to leave San Carlos to work on the Dam, and then returned home to the Verde Valley.

When the Tribes returned from San Carlos, either by escape or permission, they found their homes, farms and communities occupied or dominated by non-Indians. Nevertheless, the Tribal members persisted and established new camp and farm sites. Over a period of years a number of parcels of land occupied by Tribal members were acquired in trust either by the United States by statute, gift or exchange.

The Yavapai-Apache Reservation consists of several parcels of land totaling approximately 653 acres located in the Valley of the Verde River, Yavapai County, Arizona. Reservation parcels of land are located near Clarkdale, near Camp Verde, near Middle Verde, near Rimrock and at the I-17 interchange for the Montezuma Castle National Monument. Each parcel has a different acquisition date ranging from 1909 to 1974.

The Yavapai-Apache Nation has approximately 2000 members. The Nation relies upon surface water from the Verde River for irrigation. It is totally dependent upon groundwater for all domestic, municipal and commercial purposes. Both surface water and groundwater are declining in the Verde Valley as a direct result of groundwater pumping in the Big Chino Valley, the Little Chino Valley near Prescott, Arizona, and pumping in the Verde Valley.

STATEMENT OF THE CASE

A. The Gila River Adjudication.

"The Gila River System is over appropriated; the supply of water presently available and which seems likely to be available in the future is not sufficient to satisfy the needs and demands of existing projects." *Arizona v. California*, Report of the Special Master, December 5, 1960, p. 325; *see also Gila River I* at 232 and *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996).

B. The Proceedings Below.

The Gila River stream adjudication began as an administrative proceeding in 1974 when Salt River Project filed a petition with the Arizona Land Department to determine the conflicting rights in the Salt River above Granite Reef Dam. In

its present form the Gila River adjudication is a consolidated effort to achieve "a comprehensive general stream adjudication to determine 'the nature, extent and relative priority' of the water rights of all who use the water of a 'river system and source' . . ." with respect to waters within the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz and San Pedro watersheds. *Gila River III* at 742.

Gila River III is the third case decided by the Arizona Supreme Court in Arizona's general stream adjudications within the context of six special interlocutory issues certified for review by the Arizona Supreme Court.[8]

The Petitions filed by Phelps Dodge Corporation and the Salt River Project have requested the Court to review only Issue 4 decided in *Gila River III*.[9] The Apache Tribes allege that Petitioners have attempted to bifurcate Issues 4 and 5 for purposes of this Court's review, because the *Gila River III* court's holding with respect to Issue 5 "fits four square" with the Court's decision in *Cappaert* and provides the logic and rationale for the *Gila River III* court's holding with respect to Issue 4.

SUMMARY OF ARGUMENT

Gila River III seeks to implement this Court's decision in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545

8. *See* Appendix to Petitions, Appendix B, pp. B1 and B2, the Arizona Supreme Court's "Orders Concerning Petitions for Interlocutory Review" filed December 11, 1990, which designated the six Interlocutory Issues for review by the Arizona Supreme Court, including Interlocutory Issues 4 and 5 decided in *Gila River III*; and the Arizona Supreme Court's "Special Procedural Order Providing for Interlocutory Appeals and Certifications" dated September 26, 1989, Phelps Dodge Petition, Appendix C.

9. Issue 4 as stated by the Arizona Supreme Court is "Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law?" Issue 4 is clearly a federal question. Issue 5 as stated by the Arizona Supreme Court is "Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights?" *See Gila River III* at 741. Issue 5 is clearly an interrelated federal question with Issue 4.

(1983) (herein "*San Carlos*"), wherein this Court decided in part that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights and applies to all states, thus providing Arizona courts with the jurisdiction to adjudicate federal reserved water rights in Arizona's general stream adjudications, and decide federal reserved water right questions, such as, the Arizona Supreme Court decided in *Gila River III*.

The Court also held in *San Carlos* that state courts have a solemn obligation to follow federal law, and that there is a powerful federal interest in safeguarding federal reserved water rights from state encroachment. *San Carlos*, 463 U.S. at 571. *See also United States v. Superior Court*, 697 P.2d 658 (1985), which upheld the jurisdiction of Arizona courts to adjudicate federal rights in the general stream adjudication, and also upheld the constitutionality of Arizona's general stream adjudication procedures.[10]

The Apache Tribes respectfully submit that this Court lacks appellate jurisdiction to grant certiorari in this matter, because the Arizona Supreme Court's decision in *Gila River III* is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a).[11] *Gila River III* is interlocutory; and related federal questions must

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10. For a history of Arizona's general stream adjudications, *see San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (1999), a special action filed in the Arizona Supreme Court by the Apache Tribes, which held multiple legislative provisions enacted in 1995 relating to Arizona's general stream adjudications unconstitutional. This unconstitutional legislation delayed this adjudication four years.

11. *See Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 122, 123-124, 127 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (herein "*Cox Broadcasting*"); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); and *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

be decided in future trial court proceedings before it is determined that any federal reservation in Arizona has a reserved right to groundwater (*Gila River III* at 748).[12]

These federal questions include, but are not limited to, a trial court's determination that the purposes of a particular federal reservation entitles that reservation to groundwater; and that such reservation requires groundwater to satisfy its quantified federal reserved water rights. *Gila River III* at 750.

Until a trial court adjudicates all of these federal questions relating to whether a particular federal reservation has a federal reserved right to groundwater, and the Arizona Supreme Court reviews the decision, there is no final judgment with respect to Issue 4 which might be reviewable by this Court under 28 U.S.C. § 1257(a).

Assuming *arguendo* that *Gila River III* is a final judgment, the Court should refuse to exercise its discretion to accept jurisdiction because the decision in *Gila River III* is abstract in nature.[13] *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947). *See* Part VI herein.

The Arizona Supreme Court decided both Issues 4 and 5 in the affirmative, holding that: (1) federal reserved rights extend to groundwater to the extent necessary to accomplish the purpose

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12. The Court has held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent necessary to accomplish the purpose of that reservation. *Winters v. United States*, 207 U.S. 564 (1908) ("*Winters*"); *Arizona v. California*, 373 U.S. 546 (1963); and *Cappaert v. United States*, 426 U.S. 128 (1976) ("*Cappaert*"). This doctrine of federally reserved water rights has been extended to surface water. This Court has not yet decided if federally reserved water rights extend to groundwater.

13. In *Gila River III* at 748, the court stated: "We decide this issue [Issue 4] in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater."

of a reservation (Issue 4); and (2) holders of federal reserved rights to groundwater have the right to protect their groundwater from depletion by state groundwater pumpers to the extent necessary to accomplish the purpose of a reservation (Issue 5). It held that for the purpose of the federal reserved rights doctrine, it makes no difference whether water ". . . runs above or below the ground." *Gila River III* at 747.

Issues 4 and 5 were decided in the abstract because there has been no adjudication of the water rights of any federal reservation in Arizona. Issues 4 and 5 are inextricably related. *Gila River III* at 748, citing *Cappaert.*[14]

Presently there is no case or controversy. Petitioners can allege no present harm or constraint on their rights. Until a trial court decides that a particular reservation has a federal reserved right to groundwater, and the quantity and priority[15] of that right, state groundwater pumpers will continue to encroach upon and deplete[16] federal reserved groundwater

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14. In *Cappaert*, at 145, this Court held that federal reserved surface water rights are not dependent upon state law or state procedures, and that they are therefore protected from depletion from groundwater pumping authorized under state law.

15. The trial court must determine the priority date of the reservation's right to groundwater, Salt River Project Petition, another related federal question, since this issue was not explicitly addressed in *Gila River III., id.* at 20.

16. The Arizona Supreme Court noted in *Gila River III* that some Indian reservations have already been "dewatered" by "off-reservation" pumping. *Gila River III* at 748. The 26 year delay of the adjudication of water rights in the Arizona general stream adjudications has resulted in the permanent depletion of the federal reserved water supplies for some Indian reservations in Arizona. Interlocutory review by this Court now of the *Gila River III* decision, would only constitute further intolerable delay. *See United States v. Gila Valley Irrigation District*, 959 F.2d 242 (1992) where the San Carlos Apache Tribe attempted to protect its surface rights to the Gila River from encroachment by upstream groundwater pumpers.

as they have in the past, despite the decision in *Gila River III*.[17]

The Court should therefore deny the Petitions of Phelps Dodge and Salt River Project.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION BECAUSE THE DECISION IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(a).

A. The Arizona Supreme Court's Decision in *Gila River III* is Not a Final Judgment Under 28 U.S.C. § 1257(a).

The Petitioners have failed to carry their burden of affirmatively establishing that the decision in *Gila River III* is a "final judgment" within the meaning of 28 U.S.C. § 1257(a). *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948). The Court's appellate jurisdiction to review a state-court decision under 28 U.S.C. § 1257(a) is limited to a "final judgment" rendered by the highest court of the state which rendered the decision. *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-477 (1975) (herein "*Cox*").

The "final judgment" rule has been interpreted by this Court "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In *Radio Station WOW, supra*, this Court provided the rationale for the "final judgment" rule:

> This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where

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17. In *Gila River III* at 749-750, the Arizona Supreme Court held: "We similarly hold that once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right."

> intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments.

Radio Station WOW at 124.

The Court in *Cox* recognized four categories of cases that constitute exceptions to the final judgment rule where state-court judgments are treated as final even though there are further proceedings to take place. None of these four categories apply, however, where there are other *federal questions* that must be decided in the further proceedings to take place. *Cox* at 477. This Court in *Cox* stated:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid. "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc. v. Johnson, supra* at 124, as well as precipitate interference with state litigation.

Cox at 477.

Phelps Dodge argues that only the fourth category of exceptions to the "final judgment" rule applies in this matter.[18] This Court has ruled that there may be an exception to the "final judgment" rule where the federal question has been finally decided by the state court, but: (1) there are further proceedings pending in which the party seeking review might prevail on the

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18. Salt River Project did not argue that *Gila River III* falls within any of the four categories of exceptions to the "final judgment" rule. Respondents therefore presume that Salt River Project relies on the arguments made by Phelps Dodge.

merits on non-federal grounds, thus preventing review of the federal question by this Court; and (2) where reversal by this Court on the federal question would be preclusive of any further litigation in state court. The Court has held that it will only accept review in the forth category, if failure to do so would seriously erode federal policy. *Cox* at 482-483.

Here federal policy supports denial of Petitioners' Writs. *Gila River III* is a preliminary decision to guide the trial court. In Contested Case W1-203, proceeding below, the rights of the Gila River Reservation will be determined. The Trial Court will examine nearly a half million pages, executive orders, statutes, decrees, hydrologic reports to determine, in the first instance, whether that Reservation has a reserved water right; and if so, whether surface water is adequate to satisfy it; and if not, how much groundwater would be necessary to satisfy the right; and if so, to what extent, if any, pumping under state law would be limited to protect the federal purposes of that Reservation.

The same process is necessary for each federal reservation. It will be decades at the present pace before a final judgment in a factual setting will join the federal issues in a factual context. Meanwhile, *Gila River III* does not preclude Petitioners from exercising their alleged state rights to pump although they are on notice.

This fourth category of cases does not apply to *Gila River III* because there are other critically related federal questions that still must be decided in further trial court proceedings. The cases cited by Phelps Dodge that *Gila River III* is a final judgment, *Cox, supra*, and *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), are therefore inapposite.

Moreover, *Gila River III* could not fall within the fourth category of cases because: (1) it is impossible that Petitioners could prevail on the merits on non-federal grounds, since they could only prevail on the merits if all of the related federal questions discussed herein were decided in their favor; and (2)

refusal by this Court to accept review now will not erode federal policy.

B. The Decision Is Interlocutory.

The Arizona Supreme Court has stated expressly that *Gila River III* is interlocutory. As discussed above, future trial court proceedings must decide dependent and critically related federal questions[19] *Gila River III* therefore does not fall within any of the four exceptions identified in *Cox*.

With respect to Issue 4, the federal question as to whether any particular federal reservation, Indian or otherwise, has a reserved right to groundwater, includes the related and dependent federal questions regarding the purposes of a reservation, and the quantification of that reservation's right to federally reserved waters:

> A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis. *See United States v. New Mexico*, 438 U.S. at 700.

Gila River III at 748.

Under *Gila River III*, the trial court will determine the purposes of a reservation, and quantify and prioritize each of a reservation's federal reserved water rights. Many reservations were established under multiple treaties, execute orders and

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19. *See Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 122, 123-124, 127 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (herein "*Cox Broadcasting*"); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); and *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

parcels. Petitioners below have urged that each addition carries a separate federal purpose.

With respect to Issue 5, the *Gila River III* court decided that no federal reserved right holder is entitled to injunctive relief until after it establishes a reserved right to groundwater (Issue 4), and then only to the extent necessary to preserve the reservation's groundwater rights (Issue 5).

> In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

Gila River III at 750.

This will require a complex evaluation of the water supply, both surface and groundwater. The Court will determine the water supply which was available at the time each reservation parcel was established. It will evaluate the present supply to determine whether surface water is adequate. If not, it will evaluate complex questions related to the groundwater supply under or near the reservation. At that time, the trial court will structure the rules necessary to protect the federal purposes for the reservation. As in *Cappaert*, pumping off the reservation will be limited under *Gila River III* only to the extent required to protect the federal purpose.

A related but separate federal question included within Issue 5, not decided, but discussed in *Gila River III*, is whether the Arizona Supreme Court's definition of "subflow" (Interlocutory Issue No. 2 now pending before the Arizona Supreme Court for decision), will be broad enough to protect the surface water rights of federal reservations from depletion by pumping. *Gila River III* at 749.[20] Respondents allege that the regulation of

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20. In *In re the General Adjudication of All Rights To Use Water in the Gila River Systems and Source*, 857 P.2d 1236 (1993), (Cont'd)

state groundwater pumping within the category of "subflow," as surface flow under the law of prior appropriation, will not be adequate to protect federal reserved surface water rights. State groundwater pumping of "subflow" to be defined by the Arizona Supreme Court in the pending Interlocutory Issue No. 2 Issue, will be treated as the appropriation of surface flow and will likely be assigned a priority date and diversion rate, and regulated accordingly under the doctrine of prior appropriation.

These critical federal questions demonstrate that *Gila River III* is not a final judgment under category 4 of *Cox*. Moreover, that category does not apply with respect to Issue 4, because it is impossible that Petitioners could prevail on the merits on non-federal grounds. The trial court would have to rule against Petitioners on all of the related federal questions discussed herein, if they are to prevail with respect to Issue 4.

Gila River III does not erode federal policy. It is consistent with the federal reserved water rights doctrine, as clearly shown by the Arizona Supreme Court's careful application of the prior decisions of this Court, including *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); and *United States v. New Mexico*, 438 U.S. 696 (1978). The decision in *Gila River III* therefore does not erode federal policy, and would not be reviewable under the fourth category of exceptions to the "final judgment" rule, even if all other prerequisites for review were satisfied.

Interlocutory review by this Court now of *Gila River III*, violates both the substance of the "final judgment" rule, and the policies underlying such rule, because interlocutory review

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(Cont'd)

(Interlocutory Issue No. 2), the Arizona Supreme Court remanded the issue of "subflow," *i.e.*, whether a well pumping near a river depletes streamflow to the extent that it must be regulated as an appropriation of surface flow, to the trial court. The trial court on remand determined that a well pumping from the "younger alluvium" connected to a river is pumping "subflow." The trial court's decision was reviewed by the Arizona Supreme Court, and a final decision is pending.

now would substantially and needlessly interfere with Arizona's ongoing general stream adjudications, and in particular, the Gila River Indian Community's federal reserved water rights in Arizona in W1-203. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

II. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE *GILA RIVER III* DECISION IS ABSTRACT IN NATURE.

Gila River III is abstract in nature, as a matter of substantive law. This Court should not accept jurisdiction, even if the Court determined that the decision was a final judgment. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

The *Gila River III* court explained that it was not imposing a standard upon the trial court for determining the purpose of any reservation, because such a standard is not well-suited to "abstract declaration and should instead emerge from testing in the solid. context of the facts." *Gila River III* at 748-750. Thus, the trial court in future proceedings involving the issue as to whether a particular federal reservation has a reserved right to groundwater, will be required to decide other related federal questions, including the standard for determining the purpose of any particular reservation, and if ". . . other waters are inadequate to accomplish the purpose of a reservation." *Gila River III* at 748.

The *Gila River III* court also followed this Court's holding in *United States v. New Mexico*, 438 U.S. 696 (1978) (herein "*New Mexico*"), and held that a reserved right to groundwater may only be found where "other waters" are inadequate to accomplish the purpose of a reservation. Assuming *arguendo* that the *Gila River III* decision is a final judgment, the Court should not grant review because the decision comes to this Court in a highly abstract form as acknowledged by the Arizona Supreme Court in its decision. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California*

Department of Corrections, 452 U.S. 105 (1981). It has long been this Court's practice not to decide abstract issues of law.

Petitioners present no case or controversy. The Petitioners are essentially requesting that the Court render an advisory opinion on Issue 4, one of several related federal questions in *Gila River III*. This Court should decline discretionary certiorari review in this matter, where further Arizona state court proceedings will tender the related federal questions to this Court in clean-cut and concrete form, grounded in the bedrock of facts, after they have actually been decided and applied in the adjudication of a particular federal reservation's federally reserved water rights. *Gila River III* at 748-750; *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981).

III. THE ARIZONA SUPREME COURT DECISION CONFORMS WITH THE PREVIOUS DECISIONS OF THIS COURT REGARDING FEDERAL RESERVED WATER RIGHTS.

A. The *Gila River III* Court's Holdings With Respect to Issue 4 and 5.

With respect to Issue 4, the *Gila River III* court held:

> Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation.

Gila River III at 751.

With respect to Issue 5, the *Gila River III* court held:

> Holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.

Gila River III at 751.

The *Gila River III* court specifically rejected all of the arguments that Petitioners make here that state law regarding

groundwater pumping is adequate to protect federal reserved water rights.

First, the Arizona Supreme Court stated that this Court has defined the federal reserved water rights doctrine as an exception to Congress' deference to state water law. *Gila River III* at 747. *See Cappaert*, 426 U.S. at 144 (holding that the Desert Land Act does not apply to water rights on federally reserved land. *See also United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Petitioners therefore egregiously misstate the law when they argue in their Petitions that federal reserved rights are deferential to state water law.

Second, the Arizona Supreme Court in *Gila River III* also rejected Petitioners' arguments under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), that state law is adequate to protect federal reserved water rights to groundwater, the court holding that if Arizona groundwater law applied to federal reservations, all overlying landowners would have an equal right to pump as much water as they can put to reasonable use, and all aquifers underlying federal reservations could be pumped dry by "off-reservation" pumping.

The court acknowledged in its decision that many aquifers underlying federal and Indian reservations have already been depleted by state groundwater pumpers.[21]

The *Gila River III* court correctly rejected Petitioners' argument that federal law should adopt the state rule of decision for the reason that it overlooks the fact that federal reserved water rights are by nature a federal preserve intended to continue in perpetuity, and they must fulfill the "future requirements" of

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21. The *Gila River III* court at 748 noted that "Within the Lower Gila River watershed [Gila River Indian Reservation], groundwater tables have been so lowered as to sever the connection between ground and surface water." The court also noted at p. 748 that "Some Indian reservations have been entirely "dewatered" by off-reservation pumping." citing *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 665-66 (1986).

federal and Indian reservations, citing *Winters*, *supra*, and *Arizona v. California*, *supra*:

> A theoretical equal right to pump groundwater in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumping.

Gila River III at 748.

The application of state groundwater law to federal reservations, even in a "nondiscriminatory" manner as argued by Petitioners, would nevertheless frustrate or defeat the federal purposes and objectives of federal reservations, since the groundwater underlying federal reservations would be pumped dry under the state rule of decision. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

The federal reserved water rights doctrine must therefore be applied to groundwater for all federal reservations as a matter of federal law in order to protect and safeguard federal interests. *Cappaert*, *supra*.[22]

B. The *Gila River III* Court's Decision Follows This Court's Previous Decisions Regarding Federal Reserved Water Rights and Therefore Does Not Erode Federal Policy.

The *Gila River III* court cited the holdings of this Court in both *Winters* (federal reserved rights extend to surface water) and *Cappaert* (federal reserved surface water protected from depletion by state groundwater pumping),[23] as guideposts

---

22. Issues 4 and 5 are inextricably related because Issue 5 protects the groundwater underlying federal reservations from being depleted.

23. In *Cappaert*, this Court held: "Thus, since the implied-reservation-of-water is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion if of surface or groundwater." *Cappaert* at 143. The Court held that reserved surface water at Devil's Hole which was part of the Death Valley National Monument was protected from depletion by state groundwater pumping to the extent necessary to satisfy one of the purposes of the reservation which was to preserve a unique species of fish.

providing the rational for their holding that federal reserved water rights may also extend to groundwater:

> While Cappaert bears most directly upon our discussion of issue 5 in Part IV of this opinion, we find it helpful to our resolution of the present issue [Issue 4] as well. That federal reserved right law declines to differentiate surface and groundwater — that it recognizes them as integral parts of a hydrologic cycle — when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected.

Gila River III at 747.

Thus, the Arizona Supreme Court applied and followed this Court's previous decisions regarding federal reserved water rights in *Winters, Cappaert and New Mexico*. *Gila River III* is therefore consistent with the federal substantive law and policies protecting federal reserved water rights as established by this Court.

C. The Decision Is Consistent With The Decisions of Other Federal Courts.

The Decision is consistent with the decisions of all federal courts which have ruled on the federal reserved rights to groundwater. While this Court has not yet ruled that federal reserved water rights extend to groundwater, some federal courts have.

The Federal District Court in San Carlos expressly ruled on the Apache Tribes' concern that Arizona would not follow federal law concerning the reserved right to groundwater. *Matter of Determination of Conflicting Rights To The Use of Water From The Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), *rev'd on other grounds*, 668 F.2d 1093 (1982), *rev'd*, 463 U.S. 545 (1983), *vacated* 721 F.2d 1187 (1983) (action

stayed pending conclusion of state court proceeding). The Court cited *Cappaert* as the authority for its ruling:

> The Supreme Court in *Cappaert* further stated that the "United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 426 U.S. at 143, 96 S.Ct. At 2071.
>
> Thus, the State proceedings will determine federal reserved water rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law.
>
> Those rights which are state created will be determined by state law and Federal law will be applied to determine those rights which derive from Federal law.

484 F. Supp. at 784.

Thus, the U.S. District Court of Arizona held in this case that because Arizona general stream adjudications would adjudicate the federal reserved water rights of Indian tribes to both surface and groundwater, the state proceedings qualified as a McCarran Amendment proceeding.

In *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699-700 (1986), the U.S. Court of Claims expressly held that groundwater under the Gila River Indian Reservation was impliedly reserved for the Gila River Indian Community under the federal reserved rights doctrine, citing *Winters, Arizona v. California*, and *Cappaert, supra*, as authority.

In *Tweedy v. Texas Company*, 286 F. Supp. 383, 385 (Mont. 1968), the U.S. District Court of Montana acknowledged that while the *Winters* case dealt only with surface water, the same logic which led this Court in *Winters* to hold that surface waters had been reserved, would also apply to groundwater:

> The land was arid — water would make it more useful, and whether the water were found on the

> surface of the land or under it should make no difference.

In *Park Center Water District v. United States*, 781 P.2d 90, 95 (Colo. 1989), *cert. den.*, 494 U.S. 1079 (1990), the Supreme Court of Colorado assumed without deciding, that federal reserved water rights apply to groundwater in the same way as it does to surface water, citing *Cappaert*.

In *State of Nevada v. United States*, 165 F. Supp. 600 (D. Nev. 1958) the federal court ruled that the federal government had the right under the holding in *Federal Power Comm'n. v. Oregon*, 349 U.S. 435 (1955), to make full use of all underground or percolating waters developed in its own wells on federal reserved land, independent of state law or procedures, and was therefore not required to comply with state law or procedures to use its underground waters.

The Ninth Circuit in *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) also held that Federal reserved rights extend to both surface water and groundwater:

> **Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation.** *Neveda ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.*, 286 F.Supp. 383 (D. Mont. 1968).
>
> **In our view the United States may reserve not only surface water, but also underground water.**

(Emphasis added).

Petitioners' argument that this Court should treat *Gila River III* as a final judgment under the fourth category of exceptions to the "final judgment" rule under *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-477 (1975) (herein "*Cox*"), because it is inconsistent with and will erode federal policy, is therefore erroneous.

D. The Gila River III Court Correctly Decided Issue 4.

The Court has long recognized the reality that groundwater and stream flow are connected. It is not an impermissible leap of faith to find that "groundwater and groundwater" are connected. In *Arizona v. California*, all withdrawals of water in the Upper Basin, from surface flow or from wells, is counted against the Upper Basin share of the Colorado River. The Court also ruled that all "underground sources" were to be counted against New Mexico's share of the Gila River under the equitable apportionment between New Mexico and Arizona. *Arizona v. California*, 376 U.S. 340, 347, 348 (1964). New Mexico water users were enjoined by the Court from withdrawing water from underground sources in the Gila Basin in New Mexico, with certain exceptions. *Id.* at 347, 348, 349. It further ruled that under those limited exceptions, pumping could be enjoined when it "is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree." *Id.* at 350. *See also Cappaert* at 142; *Kansas v. Colorado*, 514 U.S. 673 (1995) (Post Compact pumping in Colorado has caused material depletion of usable state line flows of the Arkansas River); *Nebraska v. Wyoming and Colorado*, 515 U.S. 1 (1995) (Nebraska would be permitted to allege that increased groundwater pumping within Wyoming threatened substantial depletion of the North Platte River's natural flow.)

Issues 4 and 5 are inextricably intertwined because *Cappaert* was followed by the *Gila River III* court in its holding that federal reserved right to groundwater may be protected from depletion by state groundwater pumping. The need to protect federal groundwater from depletion, provides the logic and rationale for the *Gila River III* court's holding, that federal reserved water rights extend to groundwater to the extent necessary to accomplish the purpose of a reservation.[24]

24. The Arizona Supreme Court found that even if Arizona state law were applied in a nondiscriminatory manner among state and federal interests, groundwater underlying federal reservations could be totally depleted, as has already happened to some federal and Indian (Cont'd)

IV. CONFLICTS WITH OTHER CASES DO NOT EXIST TO PROVIDE REASON TO GRANT CERTIORARI.

There is no reason to grant certiorari under Supreme Court Rule 10.

Petitioners argue that there is a conflict between two state courts of last resort regarding the same important federal question.[25] This Court did accept jurisdiction in Wyoming in *Wyoming v. United States*, 488 U.S. 1040 (1989) (herein "*Wyoming*"), to review the federal question of the extent of Indian federal reserved water rights under the "practicably irrigable acreage" standard adopted by this Court in *Arizona v. California*, 373 U.S. 546 (1963). However, the Wyoming state court decision, *In re: the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), was clearly a final judgment within the meaning of 28 U.S.C. § 1257(a). It was not an interlocutory judgment as argued by Phelps Dodge in its Petition at p. 13 because the trial court had adjudicated all of the federal questions and the reserved water rights of the Wind River Indian Reservation.[26]

(Cont'd)
reservations in Arizona. *Gila River III* at 748. It is the federal concern and objective to protect against the depletion of the federal interest, here groundwater underlying federal reservations (Issue 5), that predetermines the federal decision that the federal reserved rights doctrine applies to groundwater (Issue 4).

25. The Petitioners cite the dissenting opinion in *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) (herein "*Clinch*"), for the proposition that there is a conflict between the Arizona and Wyoming state courts of last resort regarding whether a federal reserved right to groundwater exists.

26. This Court has held that the designation given the judgment by state practice is not controlling as to finality. *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946). However, *Gila River III* is interlocutory, because further trial court proceedings are necessary to apply the court's holding regarding Issue 4, within the context of the adjudication of a particular federal reservation where other related federal questions must also be decided.

In *Clinch*, the Montana Supreme Court upheld its prior decision in *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, et al.*, 923 P.2d 1073 (Mont. 1996), that the Montana Department of Natural Resources and Conservation has no authority to issue any water permits on the Flathead Indian Reservation until the Tribes' reserved water rights are quantified. The Montana cases do not address the issue of whether the Tribes have a federal reserved right to groundwater. The Montana cases held that there is a difference between state appropriative rights and federal reserved rights because federal reserved rights are governed by federal law, and are established by references to the purposes of a reservation.

In *Gila River III*, unlike Big Horn, there has been no adjudication of any federal reservation's reserved water right, Indian or otherwise. The argument by Phelps Dodge that since the decision in the Wyoming state court decision was interlocutory, but treated as a final judgment that this Court should also treat *Gila River III* as a final judgment, is flawed.

In the present context of the Arizona adjudications, it appears that the first Indian water rights to be adjudicated will be those of the Gila River Reservation in Contested Case W1-203. The Special Master in the Gila River adjudication has set the briefing schedule to begin adjudicating the federal reserved water rights of the Gila River Indian Community. *See* Contested Case No W1-203, "*In re the Water Rights of the Gila River Indian Community*."

As with the Wind River Indian Reservation in the Wyoming, Issue 4, and all other dependent and related federal questions relating to whether the Gila River Indian Reservation has a reserved water right to groundwater, will be adjudicated in W1-203. If the Arizona Supreme Court then reviews the trial court judgment, and issues a decision, this Court might then have appellate jurisdiction to review Issue 4 as a final judgment under 28 U.S.C. § 1257(a).

CONCLUSION

These Petitioners initiated the Arizona adjudications. They wrote the statues and represented to the Court, the Arizona Supreme Court and these Respondents that the Arizona adjudication would be comprehensive. In San Carlos the same Petitioners told the Court:

> There is little dispute over the comprehensiveness of Arizona's statutory procedure for the general adjudication of conflicting claims to water. (fn omitted) Under that procedure, each owner of land in the watershed under adjudication is identified and personally served with process, and each water right is determined in a decree binding on all water claimants within the watershed — which, of course, is precisely the procedure required by the McCarran.

Petitioners' Reply Brief in No. 81-2147, p. 10. They should not now be heard to say that they did not mean groundwater necessary to the purposes of a federal reservation, or that it is too burdensome on state claimants to participate. It is burdensome on the Tribes . The Apache Tribes urged the Court to protect them from the State proceedings in *San Carlos.*

The Supreme Court of Arizona addressed these concerns of Petitions in *Gila River III.* It correctly determined that "for federal law, the question is one of hydrology, not compartmentalization." *Id.* at 751. It found that "the overarching purpose of the general stream adjudication statute is to provide the finality and certainty that can only be achieved through determination of all claims to water within the basin." *Id.* at 751.

Petitioners should not now be heard to say that although they knew that they could not defeat the federal purposes of an Indian reservation by surface diversions under *Winters*, they nevertheless could do it with their pumps.

The Arizona Supreme Court reminded these Petitioners that "there long has loomed the need — sometimes noted, sometimes wished away — for those same interests also to accommodate

themselves to the water claims of the vast federal land holdings that surround them." *See Gila River I*, 697 P.2d at 663. *Gila River III* at 750.

These Petitioners must abide by the proceedings they initiated. Although burdensome for all, at this point "the best way out is always through." *Gila River III* at 750.

The Court should deny the certiorari petitions because the *Gila River III* decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a); and because the decision is abstract in nature not warranting review at this time.

Respectfully submitted,

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Nos. 99-1388 and 99-1389

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION,

Petitioners,

v.

THE UNITED STATES,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION,

Petitioners,

v.

THE UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Arizona

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the implied federal reserved water rights doctrine applies to groundwater?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION

Mountain States Legal Foundation ("MSLF") respectfully petitions this Court for leave to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a).[1] The Solicitor General of the United States has given his consent to this *amici* brief. However, the San Carlos Apache Tribe, the Tonto Apache Tribe, the Yavapai Apache Indian Tribe, Camp Verde Reservation, and the San Juan Southern Paiute Tribe do not consent to the filing of this *amici* brief, and the Hopi Tribe objects to the filing of this brief because they were not provided with a copy of the brief by April 10, 2000. All parties did not respond within the time allowed.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Mountain States Legal Foundation is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited government, and the free enterprise system. MSLF's members include individuals and businesses from every state in the Union, including Arizona and other western states. Many of MSLF's members own

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[1] Copies of the consent letters received have been filed with the Clerk of the Court.

water rights in Arizona and other western states, upon which their communities and livelihood are dependent.

Since its establishment in 1977, MSLF has been active in litigation to preserve state water law principles. *See Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). MSLF is currently representing the Cities of Salmon and Challis, Idaho, in water rights litigation before the Supreme Court of Idaho involving federal reserved water rights. *See In Re SRBA, Case No. 39576 – Wilderness Reserved Claims (Potlatch Corporation, et al. v. United States)*, 1999 Opinion No. 113 (Idaho October 1, 1999), *reh'g granted*, Nov. 30, 1999.

Montana Farm Bureau Federation ("MFBF") is a voluntary, non-profit, general farm and ranch organization incorporated under the laws of the State of Montana. MFBF represents the economic, educational, and social interests of more than 8,200 member families throughout the State of Montana. Twenty percent of the commercial farmers and ranchers in the State of Montana are members of MFBF. Many MFBF members hold state water rights for farming and ranching purposes and their local communities are dependent upon state water rights as well. MFBF is concerned about any potential water law precedent that infringes upon state control of water resources.

Idaho Farm Bureau Federation ("IFBF") is a voluntary, nongovernmental, nonpartisan organization of farm and ranch families incorporated under the laws of the State of Idaho. IFBF represents the economic, educational,

and social interests of its 12,000 farmer members, representing more than half the farms in the State of Idaho. Many IFBF members hold state water rights for farming and ranching purposes and their local communities are dependent upon state water rights as well. IFBF is concerned about any potential water law precedent that infringes upon state control of water resources.

Northwest Mining Association ("NWMA") is a nonprofit, nonpartisan trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the states of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 2,500 members residing in 42 states and 8 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining. The mining industry and NWMA's members are closely tied to water rights and water law issues, as water is essential for mining activities. In fact, western water law originated in the mining camps of the west.

For the foregoing reasons, Mountain States Legal Foundation, Montana Farm Bureau Federation, Idaho

Farm Bureau Federation, and Northwest Mining Association request that this motion to file the annexed brief *amici curiae* be granted.

DATED: May 5, 2000

Respectfully submitted,

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Mountain States Legal Foundation respectfully submits this brief *amici curiae* on behalf of itself, Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Northwest Mining Association in support of Petitioners.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The identities and interests of *amici curiae* are set forth in the preceeding motion and are adopted herein.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case.

[1] In compliance with Supreme Court Rule 37.6, *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant this Petition for Certiorari because the decision of the Arizona Supreme Court below conflicts with decisions of this Court on the implied federal reserved water rights doctrine. The cases of this Court recognize Congress' long-standing deference to state water allocation principles. However, the Arizona Supreme Court's decision affords no deference to state water law. In addition, the implied federal reserved water rights doctrine was established by this Court as a very narrow exception to state water allocation principles. The Arizona Supreme Court's decision impermissibly and unnecessarily broadens the scope of this doctrine. This Court should grant Certiorari in order to address this conflict.

ARGUMENT

I. THE DECISION OF THE ARIZONA SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT ON FEDERAL RESERVED WATER RIGHTS.

A. This Court Has Always Recognized Congress' Long-standing Deference To State Water Allocation Principles.

During the mid-nineteenth century, in an effort to settle and develop the west, Congress gave up control of western water allocation. Congress' long-standing policy of deference to state water allocation principles was confirmed expressly when Congress recognized and protected state water rights in Section 9 of the Mining Act of

1866, now codified at 43 U.S.C. § 661.[2] *Atchison v. Peterson*, 20 Wall. 507, 513 (1874); *Jennison v. Kirk*, 98 U.S. 453, 458 (1879) ("These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them.") Thus, historically, Congress deferred to state water law in recognition of the sheer value of property rights acquired under state water rights systems.

Subsequently, in passing the Desert Lands Act of 1877, now codified at 43 U.S.C. § 321, Congress severed the remaining unappropriated waters of the United States from the federal public lands, reserving the waters for the use of the public "under the laws of the states and territories." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162 (1935). Consequently, after 1877, the right to use water was to be determined according to state law.

Other laws in which Congress rejected a uniform federal water law to defer to state laws governing water rights include the Townsite Act, which provided for the establishment of townsites on federal lands, 43 U.S.C.

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[2] Section 9 of the Mining Act of 1866 provided:

> That whenever, by priority of possession, rights to use of water for mining, agriculture, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested right shall be maintained and protected in same. . . . 43 U.S.C. § 661.

This provision was preserved from repeal in 1872 and remains in effect as part of the General Mining Law.

§§ 711 *et seq.* (1867) (repealed); the Organic Administration Act of 1897, 16 U.S.C. § 418 (repealed), regarding administration of the national forest system; and the 1902 Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, which assisted further water development in the western states.[3] In fact, the legislative history of the Reclamation Act makes clear that Congress considered adopting a uniform federal water law, but rejected such a notion because of the conflict and injustice that would result from displacing valuable rights obtained under state water laws.

In addition, this Court in *United States v. New Mexico*, 438 U.S. 696, 702 n.5 (1978), referred to "37 statutes in which Congress has expressly recognized the importance of deferring to state water law, from the Mining Act of 1866, § 9, 14 Stat. 253, to the Act of Aug. 28, 1958, § 202, 72 Stat. 1059, stating Congress' policy to 'recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers . . . and its interests and rights in water utilization and control.' "

This Court has since recognized a few exceptions to this general federal policy of deference to state water law. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (recognizing Commerce Clause authority to preserve navigability and water flows bordering federal

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[3] The Reclamation Act expressly provided that it was not to be construed to "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" and directed the Secretary of the Interior to "proceed in conformity with such laws." 43 U.S.C. § 383.

property); *Winters v. United States*, 207 U.S. 565 (1908) (recognizing implied federal reservation of water for Indian reservation).

For many years, *Winters* was seen as establishing a special rule applicable only to Indian reservations. This understanding was reinforced in *California Oregon Power*, 295 U.S. at 163-164, in which this Court praised the prior appropriation doctrine as essential to "the future growth and well being of the entire region" of western states.

Following the *California Oregon Power* decision, federal and state agencies and private appropriators all assumed that federal reserved water rights applied only to Indian reservations. *United States v. New Mexico*, 438 U.S. at 703 n.7. Although this assumption came to an end with *Federal Power Commission v. Oregon* (*"Pelton Dam"*), 349 U.S. 435, 448 (1955), in which the "public lands" of *California Oregon Power* were defined to exclude lands reserved for a specific purpose, this Court has more recently clarified that the federal reserved water rights doctrine is indeed a narrow doctrine.

In *United States v. New Mexico*, 438 U.S. at 701-702, 715, this Court emphasized Congress' historical policy of deferring to state water law and the narrow exception that the reserved rights doctrine made to that policy. This Court made clear that that federal policy is, and historically has been, to defer to state water law except where doing so would "entirely defeat[]" the purposes of a federal reservation. *Id.* at 700. Given the history of congressional deference to state water law and the absence of a federal common law with respect to water rights, the federal reserved water rights doctrine was never

intended to wholly supplant state water law. Rather, the doctrine is simply a limited mechanism for establishing federal water rights within the existing state system when absolutely necessary. The Arizona Supreme Court failed to heed these historical principles when it held that the implied federal reserved water rights doctrine extends to groundwater. This Court should grant this petition to resolve the conflict between the holdings of this Court and the holding of the Arizona Supreme Court.

B. This Court Established The Federal Reserved Water Rights Doctrine As A Very Narrow Exception To State Water Allocation Principles.

This Court first established the federal reserved water rights doctrine in *Winters v. United States*, 207 U.S. 654 (1908). This Court recognized that the lands reserved to the Indians were "arid, and, without irrigation, were practically valueless." *Id.* at 576. Because the treaty, or contract, between the federal government and the Indians had been completely silent with regard to water rights, this Court was forced to deal with the "conflict of implications" with regard to water rights under the agreement: reserved water rights for the reservation or the cession of water rights necessary for life by the Indians. *Id.* This Court had to decide which of the "two inferences" was intended by the agreement, opting for the one that "would support the purpose of the agreement" rather than "impair or defeat it," having no desire to see the Indians' ability to live on the reservation "destroyed . . . leaving them a barren waste." *Id.* at 577. Given the federal government's special trust relationship with Indian Tribes, *United States v. Kagama*, 118 U.S. 375, 384-385

(1886), this Court was certainly not inclined to decide that Congress had intended to set aside the reservation for the Indians without the water "necessary to sustain life." *Arizona v. California*, 373 U.S. 546, 598-599 (1963). In the context of federal reserved water rights, "Indian treaties should be interpreted generously and liberally in favor of the Indians." *In Re Rights To Use Water In Big Horn River System*, 753 P.2d 76, 96 (Wyo. 1988) (internal citations omitted).

The federal reserved water right implied in *Winters* was not an automatic "superpriority" in state-regulated waters to be invoked whenever the United States desires more water for use upon federal reserved lands. Rather, the doctrine constitutes a narrow exception to state water law, to be applied only when there is a serious "conflict of implications" going to the very purpose for which the lands were reserved. *Winters*, 207 U.S. at 577; *New Mexico*, 438 U.S. at 700-702.

The Arizona Supreme Court relied heavily on *Cappaert v. United States*, 426 U.S. 128 (1976), in determining that the implied federal reserved water rights doctrine applies to groundwater. However, *Cappaert* is inapposite on this issue. In *Cappaert*, this Court implied a federal reserved water right in the surface water of the pool inside Devil's Hole, part of a National Monument. *Id.* at 142. Although the reserved right affected the ability of the Cappaerts to pump groundwater within 2.5 miles of Devil's Hole, the reserved right was in the surface water in the Hole, not groundwater. *Id.* This Court specifically held that the Cappaerts had not acquired any appropriation rights under state law as of 1952 when Devil's Hole was reserved and the United States' rights vested. *Id.* at

139 n.5, 144 n.9. Therefore, the federal reserved water rights were superior to those of the Cappaerts. *Id.* at 143 n.8.

Thus, in holding that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," this Court was doing nothing more than reaffirming the non-novel proposition that senior water rights trump junior rights under state law.[4] *Id.* at 143. In fact, this Court acknowledged that the Desert Land Act and its predecessors "provided that water rights vested under state law or custom are protected." *Id.* at 143 n.8.

The question presented in this case was specifically left open in *Cappaert*: "No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142. This Court went on to hold that the water in the pool was surface water, foregoing the need to address the groundwater question. *Id.*; *Big Horn River System*, 753 P.2d at 99 (acknowledging dearth of cases applying reserved rights doctrine to groundwater and recognizing that this Court did not do so in *Cappaert*). This Court should grant these Petitions in order to address this very question which was left open in *Cappaert*.

The federal reserved water rights doctrine is a judicial fiction created nearly a century ago to deal with a

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[4] Unlike Arizona, the State of Nevada, in which Devil's Hole is located, applies the law of prior appropriation to both surface and groundwater. *Cappaert*, 426 U.S. at 142.

perceived oversight of Congress and the Indians in establishing Indian reservations. *Winters*, 207 U.S. at 576. Not only has the doctrine outlived its usefulness, but extensions of the doctrine will only further upset 150 years of western water law and destroy investment-backed expectations of thousands of western water users.

The problems of arid lands and limited water resources are obstacles for all western landowners and users, not merely the federal government. Rights to use of these limited water resources must be obtained by the federal government under the same rules applicable to others whenever possible. Every extension of the reserved water rights doctrine defeats the uniformity and consistency achieved by state control of water rights, leaving instead uncertainty, robbed expectations, and stymied development in western communities. "In the arid parts of the West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States." *New Mexico*, 438 U.S. at 699. The Arizona Supreme Court failed to acknowledge the original design of the implied federal reserved water rights doctrine as a very narrow exception to state water allocation principles when it held that the doctrine extends to groundwater.

This Court should return to the narrow reading of the federal reserved water rights doctrine embodied in *Winters*. Federal reserved rights should be found only where the essential purpose of a particular reservation would be defeated entirely because water rights obtained under state law would be virtually meaningless. In *Winters*,

upon acquiring reservation lands from the federal government, the Indians had reserved no rights in the water flows through the reservation for irrigation and similar purposes necessary to sustain life on the land. *Winters*, 207 U.S. at 576. As the water had been fully appropriated by others at the time of this Court's decision, leaving the Indians with no rights to use the water flowing through their reservation, the reservation land was rendered unlivable. *Id.* This is the rare type of situation that may warrant federal reserved water rights. The importance of maintaining state control over water rights in all other situations, as evidenced by Congress' consistent deferral to state water rights in federal matters, counsels a reaffirmation of the federal reserved water rights doctrine as a narrow doctrine, applicable only when a meaningful water right – unobtainable under state law – is necessary to avoid the complete failure of Congress' essential purpose and intent in reserving the land. This Court should grant these Petitions in order to reaffirm the implied federal reserved water rights doctrine as a very narrow exception to state water allocation principles.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant the Petitions for *Writ of Certiorari*.

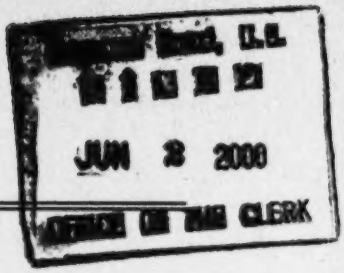
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(9)



No. 99-1388

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION, ARIZONA PUBLIC SERVICE COMPANY, GILA VALLEY IRRIGATION DISTRICT, AND FRANKLIN IRRIGATION DISTRICT,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners Phelps Dodge Corporation, Arizona Public Service Company, Gila Valley Irrigation District and Franklin Irrigation District (hereafter collectively "these Petitioners"),[1] respectfully submit this Reply Memorandum in support of their Petition for Writ of Certiorari to the Supreme Court of the State of Arizona (Petition No. 99-1388). A total of four Briefs In Opposition to this Petition were filed with this Court. The Respondents in Opposition are the United States; the Gila River Indian Community; the San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation (collectively "the Apache Respondents"); and the Hopi Tribe, Navajo Nation and San Juan Southern Paiute Tribe (collectively the "Little Colorado Respondents"). The four Briefs In Opposition raise several issues not previously addressed by these Petitioners. Accordingly, pursuant to Rule 15.6, Rules of the Supreme Court of the United States, these Petitioners submit this Reply to address each of these new issues.

I. The Respondents Argue a Question Not Presented by These Petitioners.

Both the United States and the Gila River Indian Community include in their respective Briefs In Opposition a Question Presented that differs from the question posed by these Petitioners. Specifically, the United States presents the question "[w]hether a federal reserved water right may be satisfied from groundwater that, under Arizona law, is not subject to the doctrine of prior appropriation." The Gila River Indian Community, asks "[d]o federal reserved water rights extend to groundwater

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[1] The corporate disclosure statement required by Rule 29.6, Rules of the Supreme Court of the United States, is included in Petition No. 99-1388 at page v. The information in that statement continues to be accurate.

(underground water) that is not subject to prior appropriation under Arizona law?" However, these restated questions miss the point these Petitioners have raised.

Rather than debating the hypothetical question of whether there can, under any circumstances, be a reserved right to groundwater, these Petitioners argue that: (1) the Arizona Supreme Court acted prematurely in concluding, "in the abstract,"[2] that there is a reserved right to groundwater, without having first determined the purposes for which any specific reservation was established by the federal government; (2) that the Opinion Below fails to integrate federal groundwater rights with existing state groundwater law; and (3) that the Opinion Below rejected application of state groundwater law as the rule of decision for determining federal rights to groundwater without conducting the analysis required by *United States v. Kimbell Foods*, 440 U.S. 715 (1979) and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). It is this last point that is at the heart of these Petitioners' Question Presented:

> May a state court create federal common law to govern a federal reservation's groundwater rights where nondiscriminatory state law already provides a rule of decision giving all landowners in the State equal rights to groundwater?

For all of the reasons asserted by these Petitioners in Petition No. 99-1388, the answer to this question clearly is "no." An effort by Respondents to reformulate the Question Presented in a manner more to their liking cannot change this answer. The Arizona Supreme Court has inappropriately created federal common law in a manner that conflicts with the prior opinions of this Court. Therefore, certiorari should be granted at this time to correct

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[2] *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 748 (Ariz. 1999) ("Opinion Below"), ¶ 31, *see* Pet. App. A24.

the lower court's error before thousands of parties are forced to endure years of costly litigation based on an incorrectly decided question of federal law. *See Merchantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

II. Arizona Groundwater Law is Not Unique; This Case Will Have Broad Implications Both in Arizona and in Many Other States.

Two of the Respondents repeatedly assert that Arizona's bifurcated system of water law, under which surface water is subject to the doctrine of prior appropriation while "percolating" groundwater is subject to the doctrine of reasonable use, is "unique."[3] This assertion is made in support of the proposition that the Opinion Below will have narrow application and will not affect any person outside of Arizona. In fact, the Gila River Indian Community goes so far as to assert that the Arizona Supreme Court's determination on Issue 4 in the Opinion Below will affect "only 1% of Arizona's current population – less than 20,000 people – and only 2% of current water use." Gila River Indian Community Brief In Opposition, p. 15. However, on each of these points, the Respondents are simply wrong.

A. Most States Do Not Apply the Prior Appropriation Doctrine to Groundwater.

Arizona's groundwater law is not unique. As the State of Arizona has noted, at least five western states in addition to Arizona (California, Hawaii, Texas, Nebraska and Oklahoma), apply the prior appropriation doctrine to surface water, but do not apply it to percolating groundwater. *See* Response of the State of Arizona In Support of Petitions For Writs of Certiorari (Mar. 13, 2000), pp. 16-17,

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[3] *See, e.g.*, Little Colorado Respondents' Brief In Opposition, pp. 2, 24; Gila River Indian Community's Brief In Opposition, pp. 13-14.

fn. 20. In these states alone, more than 56 million people reside. This is more than 22% of the United States' total population. E. Byerly and K. Deardorff, National and State Population Estimates: 1990 to 1994 (U.S. Bureau of the Census, Current Population Reports) p. 25-1127 (1995).

In addition, many eastern states apply some variation of the doctrine of reasonable use to their groundwater resources.[4] Other states apply some version of the "absolute dominion" rule,[5] and still others apply a "correlative rights" doctrine to groundwater.[6] In fact, only 12 states apply a prior appropriation scheme to groundwater.[7]

As its Brief In Opposition makes clear, the United States believes that the federal reserved rights doctrine can be applied in states that have not adopted "an appropriative water rights system." *See* United States Brief In

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[4] *See* Robert E. Beck, *Waters and Water Rights*, Vol. 3, Part IV, chapter 23 (1991), identifying New Hampshire, Iowa, Kentucky, Michigan, Pennsylvania, West Virginia, Ohio, Washington and Illinois as applying the doctrine of reasonable use.

[5] *See id.*, chapter 21. These states are Texas, Indiana, Louisiana, Connecticut, Georgia, Maine, Maryland, Mississippi, Massachusetts and Rhode Island. The absolute dominion rule, in its purest form, holds that a landowner may take groundwater from underneath his land to whatever extent he pleases.

[6] *See id.*, chapter 22. The "correlative rights" states are California, New Jersey, Minnesota, Arkansas, Delaware, Missouri, Wisconsin, Florida, Tennessee, Alabama, North Carolina, Nebraska and Vermont. This doctrine applies the law of riparian rights to groundwater. However, in times of shortage, western correlative rights states generally require a prorationing of groundwater while eastern correlative rights states do not.

[7] *See id.*, chapter 24. These states are Utah, Montana, Nevada, Kansas, Wyoming, New Mexico, Alaska, Colorado, North Dakota, Oklahoma, South Dakota and Oregon.

Opposition, p. 17, fn. 6. If this is true, then the Opinion Below could be applied in any of these states without any effort to integrate federal groundwater rights with the rights of all other residents of those states. That is exactly the problem with the Opinion Below – it creates a federal common law rule that operates independently of, and at odds with, the prevailing system of groundwater law in the State of Arizona. If such a conflict is allowed to occur in Arizona, it can also occur in any other state. This issue clearly is of national significance.

This point is well-illustrated by Respondent Gila River Indian Community in its Brief In Opposition. The Community notes that "[w]ater law varies widely from state to state – with individual peculiarities depending on the hydrology, geology, water needs, and the legal and hydrologic history of the particular state." Gila River Indian Community Brief In Opposition, p. 9. Precisely because there are significant variations in water law from state to state, *Kimbell Foods* and *Wilson* dictate that state law should be adopted as the rule of decision governing federal rights to groundwater, in lieu of a federal common law rule. Rather than requiring a "nationally uniform body of law," *Kimbell Foods*, 440 U.S. at 728, federal rights to groundwater, in Arizona and elsewhere, should be determined by "[b]orrowing state law" as the rule of decision to "avoid arriving at one answer . . . in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants." *Wilson*, 442 U.S. at 674.

B. Issue 4 Will Affect Millions of Arizona Residents.

As noted above, the Gila River Indian Community asserts that fewer than 20,000 Arizona residents will be affected by Issue 4. This assertion appears to be based on the Community's conclusion that Issue 4 will apply only to "those reservations that do not have surface water resources available to them and have not had surface

water resources in the past." Gila River Indian Community Brief In Opposition, p. 15. However, nothing in the Arizona Supreme Court's Opinion Below indicates any such limitation on the reach of Issue 4.

In fact, to the contrary, the Arizona court's incorrect determination of Issue 4 will impact literally millions of Arizona residents if not corrected by this Court. This is clearly demonstrated by the claims of both the Gila River Indian Community and the other tribal Respondents in Opposition. For example, the Gila River Indian Community has asserted claims in the Gila River adjudication that total more than 1,500,000 acre-feet of water. *See* Statement of Claimant ("SOC") No. 39-12652, filed June 30, 1980.[8] This is substantially more than the average annual surface water flow of the Gila River. Obviously, the balance would need to be obtained from the groundwater resources of central Arizona. In fact, the Community affirmatively asserted a right to groundwater in its Statement of Claimant, and it has vigorously pressed that claim in all subsequent proceedings.[9]

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[8] Statements of Claimant are the formal documents submitted to the adjudication court by each of the more than 24,000 parties who claim water rights in the Gila River General Stream Adjudication. They were required to be filed in response to the summons issued by the superior court at the outset of the Gila Adjudication. *See* A.R.S. §§ 45-253, 45-254. Statements of Claimant serve as the functional equivalent of the answer in a more typical civil case. Claimants are required to set forth "the particulars of [their] claim[s] on the court-approved statement of claimant form. . . . " A.R.S. § 45-254.A. The Arizona Department of Water Resources maintains publicly available copies of all Statements of Claimant filed in both the Gila and Little Colorado River Adjudications.

[9] *See* SOC No. 39-12652. The Community has consistently asserted a broad right to groundwater, including very recently demanding, in a pleading filed in the Gila River Adjudication, that "the Salt River Project and its member landowners, and all other non-Indians, halt all pumping of underground water that

The groundwater to which the Community makes claim constitutes a common resource shared by both the Community and the residents of central Arizona. Much of that resource exists in the Phoenix Active Management Area ("Phoenix AMA"), a legally defined groundwater basin that encompasses a substantial portion of the Gila River Indian Community's reservation, as well as nearly the entire metropolitan area of Phoenix, Arizona. *See* Arizona Department of Water Resources, Third Management Plan for the Phoenix Active Management Area, Dec. 1999 (hereafter "Phoenix AMA Third Management Plan"). According to the Arizona Department of Water Resources, the Phoenix AMA was home to more than 2,500,000 persons in 1995. *Id.*, p. 2-4.

Approximately 39% of the water used by these residents is groundwater from the aquifers underlying the Phoenix AMA. *Id.*, p. 3-3 (1995 data). If the Gila River Indian Community is allowed to claim a reserved right to groundwater that conflicts with Arizona's non-appropriative system of groundwater management, that claim will have an obvious and dramatic impact on all other residents of the Phoenix AMA.[10]

A similarly dramatic impact can be expected to result from the claims of the other tribal Respondents to Petition No. 99-1388. For example, the San Carlos Apache

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interferes with the water supply and water rights of the Community, and its members and Allottees, in accord with the recent decision of the Arizona Supreme Court on Interlocutory Issues 4 and 5." Response In Opposition to The Motion For Partial Summary Judgment Re Preclusive Effect of 1907 Sacaton Agreement, p. 12 (Jan. 26, 2000).

[10] As the Arizona Department of Water Resources notes, "water use by [Indian communities in the Phoenix AMA] is exempt from regulation by the state. However, it is important to include these uses in an assessment of water use for the AMA as the demand characteristics of these communities have a hydrologic impact on the safe-yield goal." *Id.* at 3-1.

Tribe claims a right to more than 775,000 acre-feet of water from the Gila River System. *See* SOC Nos. 39-63614 (Nov. 1, 1985), 39-12676 (Sept. 16, 1985). These Statements of Claimant explicitly assert a right to "groundwater, whether such sources are on or off the Reservation. . . . " *Id.* The San Carlos Apache Reservation shares a number of large groundwater basins with neighboring non-Indian communities whose groundwater rights are determined by state law.

In the Little Colorado General Stream Adjudication, the Navajo Nation, Hopi Tribe and San Juan Southern Paiute Tribe have all made claims to large quantities of water, including groundwater. For example, the Navajo Nation claims 514,043 acre-feet of water, including 93,691 acre-feet of groundwater for irrigation purposes. *See* SOC No. 39-91442 (Nov. 27, 1985). The Hopi Tribe claims 140,406 acre-feet of water, including more than 17,000 acre-feet of groundwater for irrigation. *See* SOC No. 39-91443 (Nov. 29, 1985). The San Juan Southern Paiutes claim 22,326 acre-feet of water, including 22,010 acre-feet of groundwater for irrigation. *See* SOC No. 39-91713 (Dec. 31, 1991). These three tribes share a large regional aquifer with neighboring non-Indian communities in the Little Colorado River Basin.

In each of these instances, if the tribes in question are allowed to assert a reserved right to groundwater that is not defined in a manner consistent with the state law rights of their neighbors, needless conflict will result, and arbitrary differences in water rights will be created. It is exactly this outcome that *Wilson* seeks to avoid by directing that non-discriminatory state law be adopted as the federal rule of decision when there "is no need for a uniform national rule. . . . " *Wilson*, 442 U.S. at 673.[11]

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[11] The Little Colorado Respondents' assertion that "states would be free to enact ostensibly non-discriminatory legislation which actually is aimed at defeating federal and Indian tribal water rights," Little Colorado Respondents' Brief In Opposition,

III. No Federal Reservation in Arizona has been "Entirely Dewatered."

The Apache Respondents make repeated references to the Arizona Supreme Court's assertion that "[s]ome Indian reservations have been entirely 'dewatered' by off-reservation pumping." Opinion Below, ¶ 30, 989 P.2d at 748 (Pet. App. A23). *See* Apache Respondents' Brief In Opposition, pp. 2, 12. However, this assertion by the court below is demonstrably untrue. The case cited for this proposition by the Arizona Supreme Court does not state that the Gila River Indian Reservation (or any other) has been "entirely dewatered." *See Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 665-6 (1986).

Moreover, the Arizona Department of Water Resources has estimated that "approximately 22 million acre-feet [of groundwater] were in storage [under the Gila River Indian Reservation] in 1998 to a depth of 1,000 feet below land surface." *See* Arizona Department of Water Resources, Preliminary Hydrographic Survey Report for the Gila River Indian Reservation, Feb. 1999, p. 3-71. The total volume of groundwater in storage under the reservation, including amounts below 1,000 feet, is estimated to be 59 million acre-feet. *Id.* In contrast, the total amount of groundwater depleted from storage under the Gila River Indian Reservation during the entire period from 1900 through 1998 is estimated to be only 1,045,000 acre-feet. *Id.* In fact, in the more recent period of 1983 through 1998, the Department of Water Resources estimates that groundwater in storage has actually increased by an average of more than 73,000 acre-feet per

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p. 21, is simply unfounded. State laws either are or are not discriminatory. Only nondiscriminatory state laws may be incorporated as a federal rule of decision. *Kimbell Foods*, 440 U.S. at 740.

year. *Id.* at 3-75. Groundwater levels under the reservation are estimated to have risen approximately 55 feet during this time. *Id.* at 3-76.

This is hardly a situation where the reservation has been "entirely dewatered." Although off-reservation groundwater withdrawals have undeniably had an impact on groundwater resources under the Gila River Indian Reservation, *see id.*, it is also undeniably true that the Reservation continues to have access to a very substantial groundwater resource – a resource that it has shared and must continue to share with its non-Indian neighbors. The only way to effectively manage this shared resource is to apply the same basic legal concepts to the rights each neighbor, Indian and non-Indian alike, may assert. *Wilson* dictates this result, and the Arizona Supreme Court's incorrect determination of this important issue of federal law should be corrected by this Court without delay.

IV. Conclusion.

For all of the reasons asserted by these Petitioners in Petition No. 99-1388, and for each of the additional reasons set forth in this Reply, the Petitioners respectfully request that this Court issue a Writ of Certiorari to review and reverse the Opinion Below.

Dated, Phoenix, Arizona, June 1, 2000.

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